SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1883

LAKE TRANSPORT, INC.,
Petitioner

v.

RAILROAD COMMISSION OF TEXAS, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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IN THE

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October Term, 1973

No. .....

LAKE TRANSPORT, INC.,
Petitioner

v.

RAILROAD COMMISSION OF TEXAS, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

The petitioner prays that a writ of certiorari be issued to review a judgment, entered on February 20, 1974, by the Supreme Court of The State of Texas denying petitioner standing to seek judicial review of an order of respondent Railroad Commission of Texas.

OPINIONS BELOW

The Judgment of the District Court for the 200th Judicial District of Texas is unreported, and a copy thereof is attached as Appendix "A." The opinion of the Court of Civil Appeals of Texas, Third District, is reported in 497 S.W.2d 329, and a copy thereof is attached as Appendix "B." The opinion of the Supreme Court of Texas is reported in 505 S.W.2d 781, and a copy thereof is attached as Appendix "C." The Report and Recommended Order of the Railroad Commission's Hearing Examiner, served April 29, 1971, is not reported, and a copy thereof, together with the related order of the Railroad Commission of Texas dated November 4, 1971, adopting the Examiner's Report and Order, is attached as Appendix "D."

JURISDICTION

The Judgment of the Supreme Court of Texas sought to be reviewed, entered on February 20, 1974, is attached as Appendix "E." Petitioner's Motion for Rehearing in the Supreme Court of Texas was overruled by order of that Court dated March 20, 1974, which is attached as Appendix "F."

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3).

QUESTIONS PRESENTED

1. Can petitioner, a party which participated fully in an administrative proceeding resulting in an order finding that petitioner would be materially harmed by

the action therein taken, be deprived of its right to litigate the validity of such administrative action without violation of the Due Process and Equal Protection provisions of the Fifth and Fourteenth Amendments?

2. Does the interest of petitioner in the proceeding before the administrative agency, which interest is acknowledged by the administrative agency, constitute a sufficient interest in the outcome of the proceeding to assure that petitioner's challenge will be made in a form traditionally thought to be capable of judicial resolution as a case or controversy under Article III of the Constitution of the United States?

INVOLVED STATUTES

Amendments V and XIV of the Constitution of the United States of America, U.S. Const., Amend. V, XIV, pertinent provisions of the Texas Motor Carrier Act, as amended, Tex. Rev. Civ. Stat. Ann., art. 911b, § 5a(d), 20, are attached as Appendix "G."

STATEMENT OF THE CASE

In January, 1964, the Railroad Commission of Texas, hereinafter called "Commission," granted petitioner a contract carrier permit which authorized the transportation of certain commodities for United States Gypsum Company, hereinafter called "USG," located at Galena Park, Texas. Pursuant to such permit, petitioner regularly provided service for USG until November 12, 1970, at which time USG unilaterally terminated the contract existing between petitioner and USG. However, five months prior to that time, respondent Coastal Transport Co., Inc., hereinafter

referred to as "Coastal," filed an application with the Railroad Commission of Texas seeking a certificate as a specialized motor carrier to transport the same commodities for the same company in the same territory. Upon receiving notice of Coastal's application for this new competitive authority, petitioner filed a timely protest to the granting thereof and thereby became a party protestant in the proceeding. Public hearing on the application was initially set for August 31, 1970, on the Commission's contested docket but was thereafter postponed to November 4, 1970, and again postponed until December 8, 1970, on which last date the hearing actually commenced.

Predicated upon USG's said cancellation of the contract between USG and petitioner on November 12, 1970, Coastal filed a motion to strike petitioner's protest contending that such action by USG had extinguished petitioner's interest in the proceeding and its status as a party in interest. The Commission's Hearing Examiner, and the Commission by later adoption of the Examiner's Report and Order, overruled Coastal's Motion to Strike [Tr 15, 94], to which action Coastal did not except, and petitioner was allowed to participate fully as a party throughout the six-day public hearing, through the filing of briefs, and through oral argument granted at the request of petitioner. In its order the Commission recognized petitioner as being a proper adversary party to Coastal's application proceeding and further found that the question to be resolved with respect to petitioner's presence in the proceeding related to the "weight" to be accorded petitioner's evidence. [Tr. 46] Thus, throughout the involved administrative proceeding the Commission considered and treated petitioner as a

proper party in interest. Further, it was and continues to be the Commission's view that petitioner's contract carrier permit in no way expired, or was required to be revoked, suspended or amended, due to the action of USG in terminating its contract with petitioner and that said permit remains "valid and outstanding." [S.F. 7-12]

In its order the Commission found that the transportation services theretofore provided USG by petitioner were "superior," and that if petitioner qualified as an existing carrier Coastal's application would have to be denied, and that petitioner would be materially harmed by the granting of Coastal's application. [Tr. 47-48] The Commission concluded, however, that petitioner was not an "existing carrier" solely by reason of USG's unilateral cancellation of the contract between USG and petitioner and held that the existing carrier services, absent petitioner's service, were materially inadequate and that Coastal's application should be granted. [Tr. 48]

After the entry of the Commission's order dated November 4, 1971, which granted Coastal's application, petitioner timely filed its suit to annul, suspend and enjoin the enforcement of that order in the district court of Travis County, Texas, pursuant to Section 20 of Article 911b, Tex. Rev. Civ. Stat. Ann. art. 911b § 20, which authorizes the institution of such suits by "any motor carrier or other party at interest," and pursuant to the Fifth and Fourteenth Amendments to the Constitution of the United States and pursuant to Section 19 of Article I of the Constitution of the State of Texas, alleging, *inter alia*, at Paragraph VI(9) of its original petition, that the order results in a taking

of petitioner's properties, including its substantial interest in its permit and physical properties devoted to its operations thereunder without due process of law. Notwithstanding its prior determination that petitioner was in all respects a proper party to contest Coastal's application, the Commission jointly with Coastal filed a plea in abatement challenging petitioner's standing under Section 20 of Article 911b *to appeal* the decision of the Commission granting Coastal's application. The district court sustained respondents' plea and entered its judgment dismissing petitioner's suit with prejudice. [Appendix "A"] Thereafter petitioner timely prosecuted its appeal to the Texas Court of Civil Appeals, Third District. Under its Point "II" in its brief and in the argument thereunder at pages 3 and 13-17, petitioner again urged its right to seek judicial review of the Commission's order in question, conferred by statute and guaranteed by due process under Amendments Five and Fourteen to the Constitution and Section 19 of Article I of the Constitution of the State of Texas, and accordingly prayed at page 17 that the Court reverse the judgment of the District Court on the basis of this statutorily conferred and constitutionally guaranteed right. The Court of Civil Appeals affirmed the judgment of the district court and held that petitioner was not a "motor carrier" or even an "other party at interest" entitled to appeal the Commission's order and that petitioner was not a proper party before the Commission itself, even though the Commission had directly held to the contrary! [Appendix "B"]

Petitioner thereafter sought review of the decision of the Court of Civil Appeals by way of Writ of Error to the Supreme Court of Texas. By its "Point I" peti-

tioner alleged in its application for Writ of Error, at page 2, that:

> "The Court of Civil Appeals erred in holding that petitioner was not a motor carrier party at interest with any statutory or constitutional right to appear and protest the application of Coastal or to appeal under Section 20 of the Act."

Petitioner again urged that its right to a judicial determination of the validity of the Commission's order in question was statutorily conferred and constitutionally guaranteed, and accordingly prayed at page 18 that "petitioner has exhausted its administrative remedies and by statute and constitutional due process is entitled to seek judicial determination of the validity of the order in question. . . . "

Petitioner's application for writ of error was granted by the Texas Supreme Court on the above-quoted Point of Error, and the majority of that court overruled petitioner's point without express discussion of the constitutional issues raised thereby. In a separate minority opinion, Justice Pope, joined by Justices Walker and Johnson, held that petitioner possessed standing to litigate the Commission's order citing, *inter alia, Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 159, 90 S.Ct. 827 (1970). [Appendix "C"] Petitioner, in its Motion for Rehearing to the Supreme Court of Texas, again urged under its "Point I" at page 2 that petitioner was clearly a party at interest with a statutory and constitutional right to appear and protest the application of Coastal and to appeal the Commission's order, and contended under that point, at page 10, that the Supreme Court's judgment foreclosing petitioner's standing to

challenge the administrative order announced " . . . a rule of administrative absolutism wholly repugnant to constitutional due process. . . . " In its said Motion for Rehearing at page 11, petitioner alleged that its conviction of the validity of its position respecting its standing "rests on the due process provisions of the federal and state constitutions, the governing statute and the controlling Texas and federal decisions which demonstrate petitioner's right to litigate the Commission's order of November 4, 1971." Accordingly, petitioner prayed that the Supreme Court grant its Motion for Rehearing and reverse its prior decision. Petitioner's motion was overruled by the Court on March 20, 1974.

REASONS FOR GRANTING THE WRIT

1. Petitioner has been denied due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States because it has been denied judicial review of administrative action after its full participation in the proceeding before the administrative agency and after explicit recognition by the agency of petitioner's interest in the proceeding and after explicit recognition by the agency of the material harm which would result to petitioner upon the rendering of a decision adverse to petitioner. *Baltimore & O. R.R. v. United States*, 264 U.S. 258, 268-269, 44 S.Ct. 317, 320-321 (1924). Petitioner's right to judicial review under the guaranties of the Fifth and Fourteenth Amendments does not rest solely on principles of basic fairness resulting from the fact that petitioner was a party protestant before the Commission. Additionally, petitioner's right to judicial

review as a "motor carrier or other party at interest" under Section 20 of Article 911b, rests on the acknowledged material harm which petitioner will suffer as a result of the administrative order sought to be judicially review. cf. *Boston Tow Boat Co. v. United States*, 321 U.S. 632, 64 S.Ct. 776 (1944); *Pittsburg and W. V. Ry. v. United States*, 281 U.S. 479, 50 S.Ct. 378 (1930). This Court has repeatedly recognized that one whose interest in a particular matter is the avoidance of new or increased competition has standing to seek judicial review of agency orders creating such competition. *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U.S. 470, 60 S.Ct. 693 (1940); *Alton R.R. v. United States*, 315 U.S. 15, 62 S.Ct. 432 (1942). Speculation on whether petitioner will transport the commodities sought to be transported by Coastal in competition with Coastal in the future, as indulged in by the Texas Supreme Court [Appendix "C," pp. 34-35], does not in any way diminish the material harm which has resulted and will result to petitioner if it is not allowed to challenge the Commission's order authorizing the institution of a new competitive motor carrier service by Coastal, nor could such speculation govern the question of petitioner's standing to appeal the Commission's action. *American Trucking Associations, Inc. v. United States*, 364 U.S. 1, 80 S.Ct. 1570 (1960).

2. The judgment of the Supreme Court of Texas is in direct conflict with the recent holdings of this Court on standing, including *Association of Data Processing Service Organizations, Inc. v. Camp, supra.* Therein this Court held that vendors of data processing services had standing to challenge a ruling by the Comptroller of the Currency that national banks could make data

processing services available to other banks and bank customers. Quite correctly, this Court held that the basic question of standing is whether one has a sufficient interest in the litigation to assure "that concrete adverseness which sharpens the presentation of issues," which this Court has held is required under Article III. *Accohrd, Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691 (1962); *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942 (1968); *Air Reduction Company v. Hickel*, 420 F.2d 592 (D.C. Cir. 1969). Justice Douglas, writing for the majority in *Data Processing*, explained that standing exists when plaintiff alleges injury in fact and when the interest of plaintiff which is sought to be protected is arguably within the zone of interests to be protected or regulated by the statute or Constitutional guarantee in question. Applying this test to the instant case, as a result of the action of the Commission, petitioner could have been and was put out of business, as recognized in the minority opinion of the Texas Supreme Court [Appendix "C", p. 42], and thus it is manifest that petitioner has suffered, and has alleged, injury in fact as required by *Data Processing*. Further, it is abundantly clear that the interest of petitioner in defending against destructive competition as authorized by the Commission's order in question falls within the zone of interests to be protected by the due process and equal protection provisions of the Fifth and Fourteenth Amendments.

The Court of Appeals in *Data Processing*[1] had held that the Association had no standing to contest the Comptroller's ruling because it had no sufficient "legal

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[1] *Association of Data Processing Service Organizations, Inc. v. Camp*, 406 F.2d 837 (8th Cir. 1969).

interest." This argument is effectively that of respondents in this case, *i.e.*, that USG had the legal right to terminate its contract with petitioner, and that the exercise of such right, ipso facto, eliminated the legal interest of petitioner to defend against destructive competition. The rejection of the lower court's holding by this Honorable Court, because such a legal interest test goes to the merits rather than to the question of standing, warrants, petitioner submits, a similar disposition of the holding of the Supreme Court of Texas in the instant case. Failure to set aside the decision of the Supreme Court of Texas here would sanction the unique principle that the standing, *vel non*, of petitioner to litigate the validity of an administrative order destructive of its business is dependent upon the election of a non-regulated shipper to continue to utilize the superior services of petitioner or to cancel its transportation contract with petitioner. Consistent with due process of law, petitioner's standing to litigate the order by which it is aggrieved cannot be denied at the sole whim of USG.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Phillip Robinson, one of the attorneys for Petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 14th day of June, 1974, I served three copies of the foregoing document, in duly-addressed envelopes, with postage prepaid, as required by Rule 33(1) of this Court, upon each of the following parties:

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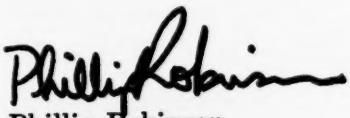

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APPENDIX
A. JUDGMENT OF THE DISTRICT COURT

NO. 194,543

IN THE
DISTRICT COURT OF TRAVIS COUNTY
126TH JUDICIAL DISTRICT

LAKE TRANSPORT, INC., ET AL

vs.

RAILROAD COMMISSION OF TEXAS, ET AL

JUDGMENT ON PLEAS IN ABATEMENT

On the 24th day of October, 1972, there came on to be heard in this court in the above entitled and numbered cause Defendants' separate pleas in abatement, one directed to the pleadings of Plaintiff Lake Transport, Inc., and the other directed to the pleadings of Plaintiff Production Transports, Inc. (now Lake Truck Lines, Inc.); and

All parties were present and represented by their attorneys and said pleas in abatement were submitted to the court without the intervention of a jury; and

The court having considered the pleadings, evidence, stipulations and argument of counsel, is of the opinion

and so finds that the law and the facts support an order sustaining the Defendants' plea in abatement directed to the pleadings of Lake Transport, Inc., and support an order overruling the plea in abatement of Defendants directed to the pleadings of Production Transports, Inc. (now Lake Truck Lines, Inc.).

It is, therefore, ORDERED, ADJUDGED and DECREED by the court that Defendants' plea in abatement directed to the pleadings of Plaintiff Lake Transport, Inc. be, and the same is hereby in all things sustained, and insofar as Plaintiff Lake Transport, Inc. is concerned, this suit is hereby severed and dismissed in its entirety with prejudice.

It is further ORDERED, ADJUDGED and DECREED by the court that Defendants' plea in abatement directed to Plaintiff Production Transports, Inc. (now Lake Truck Lines, Inc.) be, and the same is hereby in all things overruled and this suit, insofar as it concerns the pleadings of Plaintiff Production Transports, Inc. (now Lake Truck Lines, Inc.) shall stand for trial on the merits.

To the action and judgment of the court sustaining Defendants' plea in abatement directed to the pleadings of Plaintiff Lake Transport, Inc. and severing and dismissing its suit, said Plaintiff Lake Transport, Inc. does except and give notice of appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas sitting at Austin, Texas. Defendants duly except to the action and judgment of the court overruling their plea in abatement directed to the pleadings of Plaintiff Production Transports, Inc. (now Lake Truck Lines, Inc.).

ENTERED AND ORDERED of record this 13th day of November, 1972.

/s/Charles D. Mathews
Hon. Charles D. Mathews, Judge
200th Judicial District Court
Sitting for the 126th Judicial District Court

APPROVED AS TO FORM:

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By /s/Mert Starnes
Attorneys for Plaintiffs

B. OPINION OF THE COURT OF CIVIL APPEALS

IN THE COURT OF CIVIL APPEALS
THIRD SUPREME JUDICIAL DISTRICT
OF TEXAS, AT AUSTIN

LAKE TRANSPORT, INC,
Appellant

vs.

RAILROAD COMMISSION OF TEXAS AND
COASTAL TRANSPORT CO., INC.,
Appellees

FROM THE DISTRICT COURT OF TRAVIS
COUNTY, 126TH JUDICIAL DISTRICT NO. 194,
543, HONORABLE CHARLES D. MATHEWS,
JUDGE PRESIDING

This is an appeal under Section 20, Article 911b, Vernon's Civil Statutes, brought by Lake Transport, Inc., appellant, against the Railroad Commission of Texas and Coastal Transport Co., Inc., appellees, to set aside the orders and certificate issued by the Railroad Commission to Coastal Transport Co., Inc., and permanently to enjoin operations by appellee Coastal Transport Co., Inc., thereunder. The authority issued by the Commission to Coastal Transport Co., Inc., was to transport certain commodities in Texas under the authority of a specialized motor carrier permit.

Appellees jointly filed a plea in abatement to appellant's suit on the ground that appellant had no inter-

est in the subject matter of the suit and hence no justiciable interest to initiate judicial review of the orders and certificate. The trial court sustained the plea and appellant has perfected its appeal to this Court. We affirm.

Appellant is before us on two points of error, both of which we overrule. By its first point, appellant claims that the court erred in sustaining the plea in abatement directed to the cause of action alleged by appellant because appeallant possesses requisite standing to litigate the validity of the Commission's order before us; the second point of error is that the court erred in severing and dismissing appeallant's suit because such action violates appellant's statutory and constitutional rights to maintain legal action to test the validity of the Commission's order.

By an application filed in June of 1970, appellee, Coastal Transport Co., Inc., sought additional authority as a Specialized Motor Carrier transporting, among other things, gypsum board paper in rolls of not less than 4,000 pounds each, and gypsum and gypsum products. The authority sought was to extend between the plant site of United States Gypsum Company at Galena Park, Texas, and all points in Texas. At the time appellee Coastal's application was filed, appellant was authorized by the Commission to transport gypsum on this route and, pursuant to a contract with U.S. Gypsum, appellant was in fact doing so.

Appellant filed a written notice of protest to this application in July of 1970. Protests were also filed by Brown Express, Inc., Central Freight Lines, Inc., and Red Arrow Freight Lines, Inc. These three protests were withdrawn prior to hearing.

With the filing of protests under Rule 19 and 20 of the Commission's Rules of Practice, the application became a "Contested" proceeding. Appellant's contract carrier permit issued in January, 1964, is the total authority issued to appellant by the Railroad Commission which serves as a basis of its protest of appellee Coastal's application. Appellant's contract carrier permit authorized it to operate as a *contract carrier* transporting, among other things, gypsum paper, wallboard and sheathing from the facilities of the United States Gypsum Company at Galena Park, Texas, and *vice versa*, for United States Gypsum Company. The only contract under the terms of which Lake Transport, Inc., provided transportation service for United States Gypsum Company from October, 1968, to November 12, 1970, contained a provision as follows:

> "9. This contract is subject to termination at any time by either party upon 30 days' written notice to the other and shall continue in effect until so terminated."

This contract was cancelled by United States Gypsum Company in writing effective November 12, 1970, and no transportation service of any kind has been provided for United States Gypsum Company by appellant under authority of the above mentioned contract carrier permit since said date.

Prior to commencement of the hearing on application of appellee Coastal, it filed a motion to strike the protest of appellant on the ground that appellant was a contract carrier, and its contract with United States Gypsum Company, the supporting shiper in appellee Coastal's application, had been terminated and because of the termination of the contract, appellant was not

a proper party protestant within the meaning of the Commission's Rules of Proceedure. That motion was overruled by the Hearing Examiner as a preliminary matter, and appellant was permitted to participate in the proceeding. The Examiner found that it was not necessary to decide whether or not appellant was technically a proper party protestant and he further found as follows:

> "As the applicant points out in its brief, a contract carrier has no statutory obligation apart from its contract, to provide service to a contracting shipper. Likewise, the Commission has no statutory authority to require a contract carrier to serve its supporting shipper or shippers. It follows that as a general proposition the Commission should not require a contracting shipper to utilize a particular contract carrier. The contract carrier permit issued to Lake only authorizes service under a continuing contract with USG. The Commission cannot dictate the terms of a contract between Lake and USG, or for that matter, force the parties to enter into a contract. There now exists no contract between the parties, and at least with respect to USG, no intention to again enter into a contract with Lake. It is therefore the Examiner's opinion that in the absence of such contract, Lake is not properly authorized to serve USG, and hence, is not an 'existing carrier' within the meaning of Art. 911b."

The Examiner found that the application of appellee Coastal should be granted, in part, and so recommended. The Commission's adopted the Examiner's report and granted the authority to appellee Coastal to the extent recommended by the Examiner.

In its pleadings before the court, appellant alleged that the Commission's order is arbitrary, unlawful

and unjust to appellant because it is not supported by substantial evidence, does not contain findings of fact as required by statute and ignores the requirements of Article 911b V.C.S., purports to authorize transportation by a specialized motor carrier of commodities which cannot qualify for lawful transportation by that class of carrier, finds appellant is not "an existing carrier", among others.

Appellees filed separate answers denying the foregoing allegations, and filed a joint plea in abatement contending that appellant is without justiciable interest to litigate the validity of the Commission's order, such "contention being predicated upon the assertion that appellant was not a party at interest" before the Commission, and, consequently, is not a party at interest before the court. The court sustained this plea.

Appellant contends that it has been a "carrier" since 1964 operating within a territory embraced within that sought to be served by Coastal, transporting gypsum wallboard and sheathing, these being identical commodities to those sought to be transported by Coastal. Thus for a period of more than six years prior to the filing of Coastal's application, applicant possessed and operated authority directly competitive with the authority sought by Coastal.

At the hearing on the Plea in Abatement the appellant subpoenaed Mr. Walter Wendlandt, an attorney and Director of the Transportation Division of the Commission since 1965. Wendlandt testified that: the Commission has never instituted or held any proceeding whereby it purported to suspend, revoke or amend said permit pursuant to the provisions of either section 6(a) or section 12(b) of Article 911b, that the Com-

mission has consistently recognized that contracts between contract carriers and contracting shippers are subject to re-negotiation, that contract carrier permits are not ordered revoked, suspended or amended if successive contracts are not continuous in point of time, that a contract between a contract carrier and a shipper does not constitute a part of a contract carrier permit, and that no requirement exists for the filing of contracts with the Commission which are executed subsequent to the issuance of a contract carrier permit.

Director Wendlandt stated that following November 4, 1971, the date of the order under attack, the Commission had accepted appellant's monies tendered for cab cards and identification plates under appellant's contract carrier permit, had issued such cards and plates for use under such permit, and that appellant had maintained on file appropriate evidence of insurance and had filed an annual report under the permit as required by the Commission's regulations. Mr. Wendlandt further testified that in his opinion it is the view of the Commission that appellant's contract carrier permit is valid and outstanding. From this appellant contends that, the Commission recognizes appellant as a party in interest, a duly authorized and existing carrier.

Section 20, Art. 911b, Vernon's Texas Civil Statutes, under which Appellant filed its suit in the court below, provides, in part:

> "Sec. 20. If any motor carrier or other party at interest be dissatisfied with any decision, rate, charge, rule, order, act, or regulation adopted by the Commission, such dissatisfied person, association, corporation, or party after failing to get

relief from the Commission may file a petition setting forth the particular objection to such decision, rate, charge, rule, order, act or regulations, or to either or all of them in the District Court in Travis County, Texas, against said Commission as defendant."

Rule 10 (formerly Rule 30) of the Rules of Practice and Proceedure for the Transportation Division, The Railroad Commission of Texas, provides as to "parties in interest" as follows:

"Rule 10: *Parties in Interest.*

Any party in interest may appear in any proceeding before the Transportation Division. All appearances shall be subject to a motion to strike upon a showing that the party has no justiciable or administratively cognizable interest in the proceeding. As applied to proceedings under Article 911a and 911b of the Revised Civil Statutes of 1925 involving operating authority, a party in interest is any carrier operating over a route within that territory or serving any point proposed to be served by any applicant, and transporting any of the same class or classes of commodities or persons proposed to be transported by the applicant."

In Groendyke Transport, Inc. v. Railroad Commission, 426 S.W.2d 645, (Tex. Civ. App. 1968, writ ref. n.r.e.) this Court in affirming the ruling of the Commission which refused to allow the appellant to appear in a hearing for an application for a certificate by a motor carrier cited with approval the following observation of the Commission with respect to Rule 30 (Now Rule 10):

"' . . . pursuant to its consistent practice under Rule 30 the Commission in accordance with what

it deems to be its statutory mandate under Section 5a(d) (Art. 911b) has recognized as parties at interest in specialized motor carrier application proceedings only those "existing" carriers *then "serving" the involved territory* and with respect to which the statute requires a successful applicant to present substantial evidence, and requires the Commission to make detail fact findings, showing inadequacy of such "existing" carrier services and facilities.' " (Emphasis Added)

We noted in *Groendyke*[1] that Rule 30 (now Rule 10) has consistently been enforced to disallow appearances by protesting specialized motor carriers who held no permanent certificated authority to perform any of the services proposed to be performed by an applicant. We further note that if all carriers and all competing applicants for authority to perform services as carriers are considered to be parties at interest, the burden cast upon the Commission would be greatly increased.

We hold that appellant herein was not a motor carrier party at interest with any statutory or constitutional right to appear and protest the application of appellee Coastal, or to appeal under Section 20 of the Act.

It is clear from the facts of this case that the Examiner could have properly sustained appellee Coastal's motion to strike appellant's protest under the provi-

[1]Appellant contends that *Groendyke* is not in point as there the applicant denied standing did not have specific authority to transport any of the commodities named in the applications. This is true, however, the fact of the matter was that both appellants and appellees were specialized motor carriers and appellant had actually been transporting fertilizer under authority to transport petroleum products. It was fertilizer that the appellee sought authority to transport under a broader certificate of authority.

sions of Rule 10 at the beginning of the proceeding before the Railroad Commission. Appellant was not a motor carrier operating over a route within the territory or serving any point proposed to be served by the appellee-applicant, and was not transporting any of the same class or classes of commodities proposed to be transported by the appellee. It is undisputed that appellant was neither operating over any route or serving any point, nor transporting any commodities as a contract carrier at any of the times material hereto. The Commission was correct in finding that appellant was not an "existing carrier"; consequently it was not a party at interest within the meaning of Rule 10.

Aside from the provisions of Rule 10, this Court held in Railroad Commission v. Red Arrow Freight Lines, Inc., 96 S.W.2d 735, (Tex. Civ. App. 1936, writ ref'd) that an "interested party" within the meaning of Section 20, Article 911b, insofar as protesting carriers are concerned, is a carrier able to show that it has a "valid certificate from the Commission, *and was operating under it with ample facilities*" rendering some or all of the services proposed by the applicant. Also see Brown Express, Inc. v. Railroad Commission, 415 S.W.2d 934, (Tex. 1967).

Throughout Article 911b, (Sec. 8, Sec. 5a(d), Sec. 11 relating to notice) the emphasis as regards interested parties is upon "existing carriers."

The Examiner found and the Commission affirmed (after finding that appellant was not an existing carrier): "Given the state of the relationship between USG and Lake it would be a useless act to deny this application, and could provide only hallow satisfaction

to Lake in that USG would not use its service in any case."

Not being an existing carrier, appellant is not within that class described by the applicable statutes and rules of the Commission as parties in interest, and, consequently, has no standing to appeal this proceeding.

We also overrule appellant's second point by which appellant asserts deprivation of a constitutional or statutory right to maintain legal action to test the validity of the Commission's order. The authorities[2] cited by appellant are not persuasive on the issues before this Court. As we noted above, the case before us turns on the finding by the Examiner that appellant was not an existing carrier as contemplated by the statute and rules discussed above. By this action the Examiner, in effect, found appellant to be a stranger to these proceedings with no stake in the outcome. That is, an administrative body charged with that very responsibility has heard the evidence and made a finding on a vital issue. It is upon such finding that this Court bases the decision herein. Since appellant was not denied access to the Art. 911b process at the outset, and was permitted to participate and establish, if possible, its status as an existing carrier, we are unable to perceive the deprivation of any constitutional or statutory guarantee. Therefore, both points of error are overruled, and the case is affirmed.

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[2]Flast v. Cohen, 392 U.S. 83, 88 Sup. Ct. 1942 (1968); Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 90 S. Ct. 927 (1970); Air Reduction Company v. Hickel, 420 F.2d 592 (D. C. Civ. 1969); the Administrative Procedure Act, 5 U.S.C. § 702.

/s/John C. Phillips
John C. Phillips, Chief Justice

Affirmed
Filed: June 6, 1973

C. OPINION OF THE SUPREME COURT OF THE STATE OF TEXAS

IN THE SUPREME COURT OF TEXAS

NO. B-4192

LAKE TRANSPORT, INC.,
Petitioner

v.

RAILROAD COMMISSION OF TEXAS, et, al,
Respondents

FROM TRAVIS COUNTY, THIRD DISTRICT

The question here is whether Petitioner, Lake Transport, Inc., the holder of an inactive contract carrier permit, had standing to appeal an order of the Railroad Commission of Texas granting Coastal Transport Company, Inc., a certificate of public convenience and necessity as a specialized motor carrier. The courts below have held that it did not. We agree and affirm.

The circumstances posing the question are reviewed in detail in the opinion of the Court of Civil Appeals, 497 S.W.2d 329, and will be repeated only as necessary.

Lake's contract carrier permit was issued by the Railroad Commission in 1964; pursuant to the supporting contract, the permit authorized the transportation of plaster and gypsum products for United States Gypsum Company from its facilities at Galena Park, Texas, to Texas points within a 400 mile radius.

United States Gypsum Company cancelled its contract with Lake, effective November 12, 1970, pursuant to the contractual provisions for termination; the right of such cancellation is not questioned. Indeed, Lake had the same contractual right of cancellation and cannot be required by the Commission to continue to serve its contracting shipper, or any other.

Since the contract cancellation, Lake has not rendered any motor carrier service and may not resume doing so except and unless the contract is renewed, or unless Lake enters into a contract with another shipper and its permit is amended to authorize service for such shipper.

The order of the Railroad Commission which Lake seeks to set aside by invoking the appeal provisions of Art. 911b,[1] later noted, authorized an amendment of the existing specialized motor carrier certificate of Coastal Transport Company, Inc., so as to authorize the transportation of gypsum products "from the plant site of United States Gypsum Company at Galena Park, Texas, to all points in Texas," subject to certain restrictions not here pertinent. A specialized motor carrier is a common carrier rendering a specialized service as authorized by Art. 911b, the Texas Motor Carrier Act. See, *Alamo Express, Inc. v. Railroad Commission*, 407 S.W.2d 479 (Tex. 1966). As such, the carrier is under the common carrier obligation of serving the general public in the manner authorized by the certificate issued by the Commission.

Lake in this suit sought to invoke the appeal pro-

[1]Reference is to TEX. REV. CIV. STAT. ANN.

visions of Sec. 20 of Art. 911b which provide, as pertinent here:

> Sec. 20. *If any motor carrier or other party at interest* be dissatisfied with any decision, rate, charge, rule, order, act, or regulation adopted by the Commission, such dissatisfied person, association, corporation, or party after failing to get relief from the Commission may file a petition setting forth the particular objection to such decision, rate, charge, rule, order, act or regulations, or to either or all of them in the District Court in Travis County, Texas, against said Commission as defendant. . . . In all trials under this section the burden of proof shall rest upon plaintiff, *who must show by the preponderance of evidence that the* decisions, rates, regulations, rules, *orders,* classifications, acts, or charges *complained of are unreasonable and unjust to it or them.* . . . (Emphasis is added)

Rule 10 of the Rules of Practice and Procedure for the Transportation Division of the Railroad Commission states:

> Any party in interest may appear in any proceeding before the Transportation Division. All appearances shall be subject to a motion to strike upon a showing that the party has no justiciable or administratively cognizable interest in the proceeding. As applied to proceedings under Article 911a and 911b of the Revised Civil Statutes of 1925 involving operating authority, a party in interest is any carrier operating over a route within that territory or serving any point proposed to be served by any applicant, and transporting any of the same class or classes of commodities or persons proposed to be transported by the applicant.

The current status of Lake Transport, Inc. was

noted as follows in the report and recommended order of the examiner which was adopted and made a part of the order of the Commission granting the application of Coastal Transport Company, Inc.:

> As the applicant points out in its brief, a contract carrier has no statutory obligation, apart from its contract, to provide service to a contracting shipper. Likewise, the Commission has no statutory authority to require a contract carrier to serve its supporting shipper or shippers. It follows that as a general proposition the Commission should not require a contracting shipper to utilize a particular contract carrier. The contract carrier permit issued to Lake only authorizes service under a continuing contract with USG. The Commission cannot dictate the terms of the contract between Lake and USG, or for that matter, force the parties to enter into a contract. There now exists no contract between the parties, and at least with respect to USG, no intention to again enter into a contract with Lake. It is therefore the Examiner's opinion that in the absence of such contract, Lake is not properly authorized to serve USG, and hence, is not an 'existing carrier' within the meaning of Article 911b.

The trial court sustained Coastal's plea in abatement to Lake's suit, on the ground that Lake had no justiciable interest and was without standing to seek judicial review of the order of the Railroad Commission granting Coastal's specialized motor carrier certificate. As noted, this action was affirmed by the intermediate court. It held that Lake was not a motor carrier at interest with any statutory or constitutional right to appear and protest Coastal's application, or to appeal under Section 20 of Art. 911b. Particular emphasis was given to the undisputed fact that Lake was neither

operating over any route or serving any point, nor transporting any commodities as a contract carrier at any of the times material to the application of Coastal.

In *Groendyke Transport, Inc. v. Railroad Commission*, 426 S.W.2d 645 (Tex. Civ. App. 1968, writ ref'd, n.r.e.), this statement of the rule from 2 Am.Jur.2d, Administrative Law, Sec. 559, was quoted with approval:

> Where judicial review of administrative action is provided in the statute under which the administrative action is taken, the right of appeal to the courts is to be determined by looking at the statute, the valid regulations promulgated pursuant to it, and proven administrative practice throwing light upon their meaning.

It was also recognized in *Groendyke* that Rule 10 of the Commission (formerly Rule 30), has been in effect in substantially the same form since 1946 and has consistently been enforced to disallow appearances by protesting specialized motor carriers who held no permanent certificated authority to perform any of the services proposed to be performed by an applicant.

Sec. 1(h) of Article 911b defines a "contract carrier" as a motor carrier transporting property for compensation or hire over any highway in this State "other than as a common carrier." Sec. 6(a) of Art. 911b says that a permit to operate as such shall not be issued unless the character of the proposed motor carrier operation strictly conforms with the definition of a contract carrier. Sec. 6-bb of Art. 911b not only prohibits the granting of a contract carrier permit to any person operating as a common carrier, but also prohibits the granting of a common carrier certificate to any person

operating as a contract carrier. Under these statutory provisions the contract carrier is but a regulated private carrier who does not, may not, and cannot be required to serve the shipping public, or even to continue to serve a contracting shipper. It has been held that the state cannot constitutionally impose upon a private carrier the duties and obligations of a common carrier. *Frost Trucking Co. v. R. R. Commission*, 271 U.S. 583, 46 S.Ct. 605, 70 L.Ed. 1101 (1926). And later, in *Stephenson v. Binford*, 287 U.S. 251, 53 S.Ct. 181, 77 L.Ed. 288 (1932), the court spoke as follows concerning the contract carrier permit requirement of Art. 911b:

> On the contrary, the Texas statute in respect of permits deals exclusively with the private contract carrier, and requires the issue of the permit not to him in the imposed character of a common carrier, but in his actual character as a private contract carrier.

See, also *Victory Truck Line v. Red Arrow Freight Lines*, 186 S.W.2d 98 (Tex. Civ. App. 1945, writ ref'd, w.o.m.).

The underlying concept of common carriage is that of a transportation service bound to respond to the needs of the shipping public without discrimination or difference between shippers The Railroad Commission of Texas, the statutory agency charged with regulating motor carriers using the public highways, decides whether the public convenience and necessity requires a proposed common carrier service. In doing so, consideration must be given to the competitive effect upon presently operating carriers in the area and their continued ability to render effective public service. *Rail-*

road Commission v. Jackson, 157 Tex. 32, 299 S.W.2d 266 (1957). Accordingly, motor carriers performing an authorized existing service with which the proposed service will be competitive have the statutory right to appear and protest the granting of a new service on the ground that their service, and that of other existing carriers, is adequate, and hence the proposed service is not required by the public convenience and necessity. A carrier in this position also has a statutory right of appeal to the courts from an adverse order of the Commission. Sec. 20 of Art. 911a, supra. This concept, that interested parties in a proceeding involving motor carrier operating rights are "carriers (that) operate over the routes and serve the points" in question, was recognized by this Court in *Brown Express, Inc. v. Railroad Commission*, 415 S.W.2d 394 (Tex. 1967), citing *Railroad Commission of Texas v. Red Arrow Freight Lines*, 96 S.W.2d 735 (Tex. Civ. App. 1936, writ ref'd). Necessarily, the right of appeal provided by the statute presupposes that an appealing carrier is authorized to perform, and is performing, the character of service authorized by the Commission; thus the appealing carrier is in a position to show not only that the new service will impair its existing service by the loss of sustaining revenues, but also by reason of the availability of the existing services, there is not a public need for the newly authorized service.

It is manifest that the holder of an inactive contract carrier permit such as Lake cannot make this showing. It is of no significance in this respect that it is the policy of the Commission not to subject such a permit to cancellation. The salient fact is that Lake is not performing an existing service and may never do so again. Lake is not a common carrier and, as stated, is under

no duty or responsibility as such. It cannot show any impairment of its service. To say that Lake has a statutory right of appeal under such circumstances would be to say that it has the right to defeat a service which it is not rendering, and even to the limited extent of its permit, a service which it may possibly never render again; and this notwithstanding the common carrier service in question has been found by the Commission to be required by the public convenience and necessity. In our view, such an anomaly was not intended by the Legislature and is precluded by the requirement in Section 20 of Article 911b that an appealing party must be a party at interest and one in the position to show that the order under attack is unreasonable and unjust as to its existing service. *Cf.* our writing in *Oil Field Haulers Ass'n. v. Railroad Commission*, 381 S.W.2d 183, 195 (Tex. 1964), with respect to the burden of an appealing party under the identically stated requirements of Art. 6453. And see *City of Jefferson v. Railroad Commission*, 453 S.W.2d 906 (Tex. Civ. App. 1970, writ ref'd, n.r.e.).

The judgments below are affirmed.

/s/Zollie Steakley
ZOLLIE STEAKLEY
Associate Justice

Dissenting opinion by Associate Justice Pope joined by Associate Justices Walker and Johnson.

OPINION DELIVERED: February 20, 1974.

IN THE SUPREME COURT OF TEXAS

NO. B-4192

LAKE TRANSPORT, INC.,
Petitioner

v.

RAILROAD COMMISSION OF TEXAS, et al.,
Respondents

FROM THIRD DISTRICT, TRAVIS COUNTY.

DISSENTING OPINION

I respectfully dissent. Lake Transport, Inc., obtained its contract carrier permit in January, 1964, which authorized the transportation of commodities for United States Gypsum over the highways of this state. On June 22, 1970, Coastal Transport Co., Inc., filed an application with the Railroad Commission seeking a certificate as a specialized motor carrier to transport the same commodity for the same company in the same territory. In my opinion Lake is a "motor carrier or other party at interest" within the meaning of section

20, art. 911b, VERN. TEX. CIV STATS. (1964),[1] and should not have been denied the right to appear and protest the new duplicating authority.

Lake commenced serving Gypsum under its contract in 1964 and was still doing so at the time Coastal filed its application on June 22, 1970. Lake, after notice of Coastal's application for the new authority, filed its protest and the Railroad Commission then set the hearing on the contested docket. The first setting was for August 31, 1970, but the hearing was postponed to November 4, 1970. The hearing was again postponed until December 8, 1970. There was and could be no question that Lake possessed standing to contest the new application during those early proceedings. The contract between Lake and Gypsum permitted either party to terminate the contract on thirty-day notice, and effective November 12, 1970, Gypsum did so terminate the contract with Lake. The majority now holds that Lake lost its standing when the contract ended.

Lake now owns a valid and subsisting permit according to the undisputed record before us. Its permit provides:

This permit to remain in effect from and after the

[1] "If any motor carrier or other party at interest be dissatisfied with any decision, rate, charge, rule, order, act, or regulation adopted by the Commission, such dissatisfied person, association, corporation, or party after failing to get relief from the Commission may file a petition setting forth the particular objection to such decision, rate, charge, rule, order, act or regulations, or to either or all of them in the District Court in Travis County, Texas, against said Commission as defendant. . . . In all trials under this section the burden of proof shall rest upon plaintiff, who must show by the preponderance of evidence that the decisions, rates, regulations, rules, orders, classifications, acts, or charges complained of are unreasonable and unjust to it or them."

date hereof, subject to the provisions of Chapter 277 Acts Regular Session of the Forty-second Legislature, 1931; the further orders of the Commission; and the rules and regulations of the Railroad Commission of Texas, heretofore prescribed or which may be hereafter prescribed under and pursuant to the authority conferred upon it by law.

As the holder of a contract carrier permit, Lake possesses rights which are not owned by the public generally. The permit may not be suspended, revoked or amended without prior notice to Lake and an opportunity for hearing, Sec. 12(b), art. 911b, and none of those procedures have been invoked against Lake. The permit may be sold, assigned, leased, transferred or inherited. Sec. 6(e), art. 911b. It is commonly known also that the holders of contract carrier permits frequently invest large sums of money in expensive equipment and supportive facilities. In my opinion Lake owns something whether we term it a right, a privilege, a license, or "the new property." Schwartz, *Crucial Areas in Administrative Law*, 34 GEO. WASH. L. REV. 401, 433-442 (1966); Reich, *The New Property*, 73 YALE L.J. 733 (1964). As Judge Burger wrote in Gonzalez v. Freeman, 334 F.2d 570, 574 (D.C. Cir. 1964), the terminology is not so significant as is the requirement of basic fair dealing by the government with those who are dependent upon it.

In my opinion the denial to Lake of its standing to protect its permit is unfair. Lake had a valid interest in protecting its permit and its permitted business from new competition. Data Processing Service v. Camp, 397 U.S. 150 (1970); Claiborne-Annapolis Ferry Co. v. United States, 285 U.S. 382 (1932; The Chi-

cago Junction Case, 264 U.S. 258, 266-269 (1924); Associated Industries v. Ickes, 134 F.2d 694, 705 (1943); 2 AM. JUR. 2d, *Administrative Law* § 576 (1962). In 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE, (1958) § 22.11, at 259-260, the author reaches these conclusions:

> In none of the Supreme Court decisions denying standing under the Interstate Commerce Act was the petitioner a carrier. Even a mere competitive interest of a carrier is sufficient for enforcing the Act or for challenging action of the Commission.

The public also has an interest in respecting the standing of competing carriers. FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940). Justice Brandeis in Texas & Pac. Ry. v. Gulf, C. & S.F. Ry., 270 U.S. 266 (1926), said, "competition between carriers may result in harm to the public as well as in benefit; and . . . when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss." This further pertinent extract from 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 22.11 (1958), at 261, is helpful:

> Once this Brandeis analysis is accepted, other decisions recognizing the standing of carriers follow easily. Thus, Western Pac. C.R. Co. v. Southern Pac. Co., 284 U.S. 47 (1931), held that the Southern Pacific as a competitor had standing to enjoin the Western Pacific from constructing an extension before the ICC had granted approval. The Court said: "It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened or that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about

some material change in the transportation situation."

The United States Supreme Court faced this question of the standing of a contract carrier in American Trucking Associations v. United States, ICC, 364 U.S. 1 (1960). At issue was the application of the phrase "party in interest" as used in the Interstate Commerce Act. Sec. 305(g), 49 U.S.C.A. Certain existing contract carriers possessed permits to haul and had contracts to haul automobiles for General Motors in the Pacific Coast area. The existing carriers protested Pacific Motor Trucking Company's application to the Interstate Commerce Commission for authorization also to operate as a contract carrier to haul automobiles for General Motors over some of the territory already served by existing carriers. General Motors was the only shipper involved. American Trucking Associations v. United States, 170 F.Supp. 38, 41-42 (D.D.C. 1959). The district court had ruled that the existing carriers lacked standing to appeal from the Interstate Commerce Commission's order.

The Interstate Commerce Commission, in support of its order granting the new authority to haul for General Motors, found that General Motors, if the new permits were not authorized, would, nonetheless, refuse the continued services of the existing protesting carriers. This is the same situation upon which the majority relies for its no-contract-no-standing holding.[2]

[2]The manager for Gypsum testified before the Railroad Commission, as found by the examiner, "that the outcome of the proceeding would have no effect on the future use of Lake Transport. As far as USG is concerned, the contract with Lake has been cancelled and the company would enter into private carriage in the event the application is denied."

The United States Supreme Court rejected this reasoning and ruled that the competitor contract carriers had standing. The court wrote at 364 U.S., 17, 18:

> Although the three-judge court concluded that the Commission had not exceeded its authority in this case, two members of the court also believed that "there was no showing of actual or anticipated direct injury such as would entitle [the appellants] to institute this action." 170 F. Supp. at 48. In support of this conclusion, appellees rely principally upon Atchison, T. & S.F.R. Co. v. United States (DC Mo) 130 F. Supp. 76, affd per curiam 350 U.S. 892, 100 L.ed. 785, 76 S.Ct. 152. That decision held that certain railroads had no standing to challenge a Commission order authorizing acquisition by one motor carrier of others. Since the lower court in Atchison stressed the fact that the Commission there had not created any additional motor carrier service, the decision clearly is not in point. *In the instant case, not only has the Commission created new operating rights, but they are rights in which appellants have a stake. And surely the statement by General Motors that it would not in any event give the business to any appellant cannot deprive appellants of standing. The interests of these independents cannot be placed in the hands of a shipper to do with as it sees fit through predictions as to whom its business will or will not go.* The decision we believe to be controlling is not Atchison, but rather Alton R. Co. v. United States, 315 U.S. 15, 86 L.ed. 586, 62 S.Ct. 432, where the Court confirmed the standing of a railroad to contest the award of a certificate to a competing trucker. We conclude, then, that appellants had standing to maintain their action to set aside the Commission's order under the "party in interest" criterion of § 205(g) of the Interstate Commerce Act, 49 Stat. 550, 49 USC § 305(g), ... [Emphasis added.]

In my opinion, Lake had the right to protest an application which could and did put it out of business, and it is my further opinion that recognition of Lake's right to protest would be in the public interest. I would reverse the judgment of the courts below.

/s/Jack Pope
JACK POPE
Associate Justice

Justices Walker and Johnson join in this dissent.

OPINION DELIVERED: February 20, 1974

D. REPORT AND ORDER OF THE EXAMINER AND ORDER OF THE COMMISSION

APPENDIX "D"

RAILROAD COMMISSION OF TEXAS

Served April 29, 1971

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Director, Transportation Division, Motor Transportation Section, Railroad Commission of Texas, and served on all other parties in interest, within a thirty day period from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the Commission will consider the attached Order and the Order shall become effective unless exceptions are filed seasonably or the Order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within twenty days from the final date for filing exceptions.

It should not be assumed that the Recommended Order has become effective as the Order of the Commission until an Order signed by the Commissioners and Secretary has been received.

MOTOR TRANSPORTATION SECTION DOCKET NO. 7144 APPLICATION OF COASTAL TRANSPORT CO., INC. TO AMEND SMC CERTIFICATE NO. 7144 SO AS TO AUTHORIZE IN ADDITION

TO THE AUTHORITY THEREIN PRESENTLY CONTAINED, AUTHORITY TO TRANSPORT, OVER IRREGULAR ROUTES, THE FOLLOWING: GYPSUM BOARD PAPER IN ROLLS OF NOT LESS THAN 4000 POUNDS EACH AND GYPSUM AND GYPSUM PRODUCTS, AND OTHER DIRECTLY RELATED MATERIALS AND SUPPLIES USED IN THE MANUFACTURE, INSTALLATION, APPLICATION AND/OR DISTRIBUTION THEREOF, BETWEEN THE PLANT SITE OF UNITED STATES GYPSUM CO. AT GALENA PARK, TEXAS, ON THE ONE HAND, AND, ON THE OTHER, ALL POINTS IN TEXAS, SUBJECT TO THE FOLLOWING RESTRICTIONS: (1) THE HOLDER OF THIS AUTHORITY MAY TRANSPORT THE ABOVE COMMODITIES, TOGETHER WITH INCIDENTAL AND RELATED COMMODITIES MOVING WITHIN THE SAME SHIPMENT, BETWEEN POINTS IN THE PICK-UP AND DELIVERY LIMITS OF THE REGULAR ROUTE COMMON CARRIER MOTOR CARRIERS IN CITIES, TOWNS AND VILLAGES ONLY WHEN ONE OR MORE OF THE SAID COMMODITIES, BECAUSE OF SIZE OR WEIGHT, OR BECAUSE OF PHYSICAL CHARACTERISTICS OTHER THAN WEIGHT REQUIRE THE USE OF "SPECIAL DEVICES, FACILITIES OR EQUIPMENT" FOR THE SAFE AND PROPER LOADING, UNLOADING AND TRANSPORTATION THEREOF: (2) THE HOLDER OF THIS AUTHORITY IS RESTRICTED AGAINST THE USE OF CLOSED VAN TRAILERS AND IS LIMITED TO THE

USE OF SPECIALLY CONSTRUCTED HEAVY DUTY FLAT-BED UNITS.

DECIDED

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.....

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For The Applicant

LEROY HALLMAN, Esq.
DAVE MCNEILL, JR., Esq.
GEORGE E. BULLWINKEL, Esq.

For The Protestant

H. H. PREWITT, Esq.
DAN FELTS
MERT STARNES

REPORT AND RECOMMENDED ORDER

By the application filed June 22, 1970, Coastal Transport Co., Inc. hereinafter referred to as Coastal, seeks to amend its SMC Certificate No. 7144 so as to authorize in addition to the authority therein presently contained, authority to transport, over irregular routes, the following: GYPSUM BOARD PAPER IN ROLLS of not less than 4000 pounds each and GYPSUM AND GYPSUM PRODUCTS, and other directly related materials and supplies used in the manufacture, installation, application and/or distribution thereof, between the plant site of United States Gypsum Company at Galena Park, Texas, on the one hand, and, on the other, all points in Texas, subject to the following restrictions: (1) The holder of this authority may transport the above commodities together with incidental and related commodities moving within the same shipment, between points in the pickup and delivery limits of the regular route common carrier motor carriers in cities, towns and villages only when one or more of these said commodities because of said weight or because of physical characteristics other than weight require the use of "Special devices, facilities or equipment" for the safe and proper loading, unloading and transportation thereof. (2) The holder of this authority is restricted against the use of closed van trailers and is limited to the use of specially constructed heavy duty flat-bed type units.

Protests to the application were filed by Brown Express, Inc., Central Freight Lines Inc., Red Arrow Freight Lines, Inc. and Lake Transport, Inc. The protests of Brown Express, Central Freight Lines Inc. and Red Arrow Freight Lines, Inc. were withdrawn prior

to hearing. By timely motion filed, Production Transports, Inc. intervened in the proceeding in opposition. Lake Transport, Inc. and Production Transport, Inc. will hereinafter be referred to as Lake and Production respectively.

PRELIMINARY MOTION AND RULINGS

Prior to hearing, applicant filed a motion for denial and rejection of the intervention of Production Transports, Inc. As the motion for intervention was timely filed pursuant to this Commission's Rules of Procedure, this motion of applicant was overruled. Protestant Lake filed a motion to dismiss the instant application, excepting to the form and sufficiency of the application for the reason that the commodities sought to be transported were not sufficiently described so as to inform the protestant and the public of what commodities the applicant seeks to transport, and for the further reason that some of the commodities involved as a matter of common knowledge do not require the use of special equipment for their loading, unloading and transportation. Lake's Exceptions and Motion to Dismiss were overruled as a preliminary matter. Further discussion of these issues will be given at a later point in this report. Applicant filed a motion to strike the protest of Lake Transport, Inc. for the primary reason that protestant is a contract carrier, and its contract with United States Gypsum Company, the supporting shipper herein, had been terminated prior to hearing. Because of the termination of the contract and for other reasons, applicant contends that Lake is not a proper party protestant within the meaning of this Commission's Rules of Procedure. This motion was overruled

as a preliminary matter and will also be given further discussion at a later point in this report. An interlocutory appeal from the Examiner's denial of the motion of protestant for recess and republication was denied by the Commission.

APPLICANTS PRESENTATION

Presenting the operating proposal of the applicant was its President, Robert Atwell, Jr., of Houston, Texas. Coastal presently operates in intrastate commerce pursuant to Specialized Motor Carrier Certificate No. 7144 which generally authorizes the transportation of petroleum and petroleum products, chemicals (including dry chemicals) between all points in Texas.

As Exhibit 2, applicant introduced a balance sheet dated July 31, 1970, which reflects total assets of $2,964,074.67, and a capital stock and surplus account of $735,605.62. As of the date of the balance sheet, the company had recorded earnings in 1970 of $149,211.47.

Applicant maintains its general offices in Houston, Texas. At Houston, approximately 3 to 4 miles from the United States Gypsum Company plant at Galena Park, the company maintains a complete terminal of three acres where on facilities for dispatching, maintenance, cleaning and drying, tire repair and parking are maintained. Including drivers, approximately 40 persons are employed at this terminal location.

The company has a safety program with a vice president in charge of said program. The company maintains files of each driver including documentation of physical examinations, etc. In addition, it maintains a preventive maintenance program for its equipment. Additional terminals are maintained at Corpus Christi,

Harlingen, San Antonio and Texas City. Lesser terminal facilities of the company are also maintained in addition to the cities listed above at Midland and Victoria.

The company has purchased fifteen 1970 Hobb 40 foot specialized heavy duty platform trailers which it considers to be suitable for the transportation of the commodities involved in this application. These platform trailers have heavy duty aluminum extruded floors, rub rails, stake pockets and headboards. They are also equipped with boxes for the storing of tarpaulins, aeroquip straps, rachets and rubber tie downs. A piece of the aluminum flooring used in the trailer was exhibited in the hearing room and it appeared to the Examiner to be extremely strong. The company uses aluminum flooring in its trailers as in its opinion, wood floors tend to splinter and split. The trailers are designed to handle 12,000 pounds on the front end of a fork lift without damaging the floor, and, in addition, can carry up to the 50,000 pounds load limit without damaging the trailer. The rub rails are placed on the trailer so as to have adequate room to tie down tarps, hook rubber tie downs and secure the aeroquip straps. The stake pockets are used in hauling channel steel. These trailers are designed and purchased for the transportation of the commodities involved in the application.

The company operates approximately 80 tractor units, all of which are suitable for use with the trailers above described. Of these 80 tractors, approximately 50 are sleeper cab units and five are 1970 Diamond Reo tractors especially purchased for use with the new trailers.

For use with the trailer, the company has purchased 224 sets of aeroquip straping devices. These are a rachet straping device to secure loads. The company also purchased 24 sets of vinyl tarps and 1300 twenty inch black rubber strips for tie downs. The straps used with the aeroquip equipment are made of nylon.

The witness testified that wallboard is loaded and unloaded by either mechanical equipment (Fork lift) or by hand. The witness introduced as Exhibit 3 a series of pictures showing wallboard being loaded, unloaded and secured on one of the new Coastal trailers described above. The loading and unloading shown in these pictures is being accomplished by a fork lift.

It has been this witness's experience that wallboard is loaded at the U.S. Gypsum (hereinafter referred to as U.S.G.) plant at Galena Park by fork lift. At this point, the Examiner refers the reader to Appendix "A" which is a reproduction of several of the pictures introduced in this proceeding which the Examiner feels are representative and depict loading and unloading of wallboard and the manner in which this commodity is secured to trailer equipment.

In the event the application is granted, the applicant is in a position to acquire additional equipment of the type described to serve USG's Galena Park plant. The new trailers purchased for USG's service cost approximately $4525.00 each and the five tractors purchased for use with these trailers cost $19,450.00 each. Other than the five tractors purchased for use with these trailers, the company would normally supply ten other tractors from its fleet for use by USG. Trailers of the type described may be purchased on 30 days notice.

As Exhibit 5, applicant introduced its employee application forms, retirement plan, group insurance program and other information dealing with its employee relations.

The application was filed at the request of USG. Prior to the filing of the application, the company investigated the type of commodities shipped, the way they are handled and the type of equipment required for the movement of the commodities. This investigation consisted primarily of a trip to the USG Sweetwater plant at the request of Mr. Forest Davis. At Sweetwater, the witness and his son observed the handling of Gypsum board and the equipment utilized by existing carriers serving USG at that point.

The company has also filed an application for interstate authority to serve the Galena Park plant and it has received temporary authority from the I.C.C. in Docket No. MC 134957 TA to serve the states of Louisiana and Arkansas. Under emergency authority granted prior to the temporary authority, the company has transported shipments in interstate commerce for USG from Galena Park. The company has also transported such commodities under its temporary authority.

With respect to its intrastate application, the company will hold out over night delivery generally, and same day service to points within a 100 mile radius of Galena Park. It also proposes to serve the Galena Park plant on unregulated movements within the Houston metropolitan area. Applicant has transported traffic for USG in unregulated commerce. Approximately 300 such unregulated loads had been handled prior to the

date of hearing. Such service began in August of 1970 with trailers leased from McNair Leasing Company and Transport Pool of Houston. These trailers were not of the type heretofore described, but, on the contrary were platform trailers with wooden floors. When the company purchased trailers, it bought those with aluminum floors as it considered the wooden floor trailers to be unsafe and not as durable as aluminum. USG requested Coastal to haul loads of gypsum board in unregulated commerce in order to gain experience in handling this type commodity. After the purchase of the new trailer units and tractor units, this equipment was leased to Bilbo Freight Lines.

One unit was leased to Bilbo on August 31, 1970. Bilbo also hired a Coastal driver to operate the unit, the driver being given a leave of absence from Coastal and placed on Bilbo's payroll. The lease on this unit equipment was cancelled effective September 25, 1970. Units 610 and 615 were leased to Bilbo by lease dated September 10, 1970. These leases were cancelled September 23, 1970. The units of equipment were leased to Bilbo at the request of Forest Davis. Trailers for the lease tractor units were furnished by Coastal. The drivers for the other two units were also hired by Bilbo from Coastal and said drivers were given a leave of absence by Coastal during their employment with Bilbo. The witness for Coastal stated that Forest Davis had represented to him that he had requested Bilbo to furnish service from Galena Park and that Bilbo did not have sufficient equipment to do it without lease equipment.

On October 10, 1970, Coastal leased six tractors and trailers to Bilbo. The trailers were the new trailers

heretofore described in this report. Drivers were also furnished with these units, being given a leave of absence by Coastal and placed on Bilbo's payroll. Three of the drivers furnished to Bilbo by Coastal have resigned from Bilbo and gone to work for C & H Transportation Company. Three of the drivers are still with Bilbo. With respect to the tractor units leased to Bilbo, cab cards and plates issued by this Commission to Coastal have been surrendered to the Commission. The six leases described above are still in force at this date.

The other nine new trailers purchased by Coastal are used in unregulated movements and in interstate commerce. The company has transported three loads to Arkansas, three to Louisiana and two to Oklahoma. USG has paid Coastal for the loads handled in unregulated commerce and Bilbo has compensated Coastal for loads handled in the units leased to it.

The applicant has had experience in making timed deliveries in its petroleum operation and proposes to make timed deliveries with respect to loads of gypsum and gypsum products for USG. All the terminals heretofore noted operated by Coastal except those at Midland and Victoria are connected by a teletype. Coastal drivers report in daily to the terminals to make their location known. The drivers also check in to check fuel and tires. Drivers may be changed at these terminals on occasion in order to provide an expedited delivery and still meet hours of service requirements.

The company proposes to remain in compliance with the laws of the State of Texas and the Rules and Regulations of this Commission.

CROSS EXAMINATION

Prior to the filing of the instant application on June 22, 1970, the witness had approximately three to five contacts with USG personnel. The first person to contact Coastal from USG was Forest Davis, at some time prior to May 19. On May 19th, the witness went to Abilene and Sweetwater to inspect the loading of gypsum board at USG's Sweetwater plant and to inspect the operation of Gypsum Transport Company (now known as Oil Transport). On the inspection trip, the witness and his son inspected the terminal of Gypsum Transport Co. and observed its equipment. They also spoke to Mr. O. D. McClure, president of Oil Transport Company. At the time of the inspection, Gypsum Transport Co. was a contract carrier. The witness solicited Mr. McClure's advice about trailers, tarpaulins and the experience he had had in moving the involved commodities in intra and interstate commerce. Mr. McClure recommended the areoquip rachet tie downs, rubber straps and vinyl tarpaulins. Gypsum Transport utilize wooden floors instead of aluminum floors in its trailers. The witness stated that Mr. McClure indicated that wooden floors would splinter. On the inspection trip to Sweetwater, the witness was accompanied by Mr. Forest Davis. According to this witness, Gypsum Transport is owned by Merchants Fast Motor Lines, Inc.

The witness testified that in 1961 and 1962, he sold 40% of his stock in Coastal to Merchants to obtain money to purchase other stock. Approximately a year and a half or two years later, the witness reacquired this stock from Merchants.

On June 29 or 30, 1970, the witness, Mr. Hutto with

Coastal, Leroy Hallman, Mr. Davis, Mr. John Murphy, traffic coordinator of USG, and Mr. Lee Huffman with USG met in Dallas. At this meeting, the witness outlined his proposal to USG. The witness has also visited the Galena Park USG plant on several occasions.

The witness contacted Mr. Joe Cain, president of Lake Transport about purchasing Lake Transport. This contact was made after the witness had visited Sweetwater to the best of his memory. Cain informed the witness that he was presently engaged in the negotiations to sell his company to Merchants or to one of Merchants' companies. The witness stated that he had also contacted Cain approximately one and a half years prior to May with the intent of purchasing the company at that time. However, nothing came of this contact. Forest Davis represented to this witness that Gypsum Transport was a dependable and reliable company. At the meeting with USG personnel on or about June 30, the company proposed to charge 17 cents per hundred weight on gypsum commodities moving unregulated in the Houston area. The company has not charged detention on any of these loads. Neither has it had detention charges on traffic handled in interstate commerce for USG. The 300 loads transported to the date of the hearing in unregulated commerce consisted of sheet rock and wallboard.

By its application, the applicant proposes to transport bag gypsum products as well as wallboard. The company proposes to transport all the USG products shipped from the Galena Park plant falling within the commodity description of this application. The company would also transport any of the involved commodities from any point in Texas to the USG Galena Park plant.

Wallboard is the only commodity transported by this company under interstate authority. The interstate temporary authority secured by Coastal authorized the transportation of gypsum and gypsum products, materials and supplies used in the manufacture, installation and distribution thereof for the account of the United States Gypsum. This is a contract carrier authority.

Coastal at present spots trailers at USG Galena Park facility for loading. The company proposes to spot trailers in intrastate commerce and also provide split deliveries.

From its service with USG, Coastal expects to build its business to a point where it is receiving approximately $30 to $40 thousand dollars a month in revenue. This would be broken down into $15,000 per month unregulated and approximately $20,000 a month in regulated intrastate and interstate commerce.

Prior to the filing of the instant application, the company had never handled any products other than those moving in tank trailers. Since June 22, approximately 10 to 12 Coastal employees have become experienced in the handling of the commodities involved in this application.

With respect to the equipment leased to Bilbo, Bilbo carries insurance on this equipment as well as Coastal.

The company purchased some fifty International Harvester tractors prior to March 31, 1970 and traded in some older units. On cross examination it was developed that the company is being sued on several personal injury claims in Harris County, Texas. The witness testified that all such claims are covered by its insurance.

Coastal under its proposal would handle mixed shipments of any commodities USG tendered from its Galena Park plant, (regardless how tendered i.e., palletized, loose, whatever size or weight).

The company has also prepared special chocks for use in connection with securing rolls of paper on its trailers.

Coastal's personnel dispatch the use of equipment leased to Bilbo for service to USG. These trucks are also stationed on Coastal property in Houston. Tarps are used during inclimate weather to protect material.

SHIPPER TESTIMONY

Mr. Forest L. Davis, Transportation and Physical Distribution Manager for the Southwest area, United States Gypsum Company, appeared in support of the applicant. It is this witness's responsibility to provide transportation service for the various USG plants within the Southwestern area of the United States. As pertinent, USG maintains plants at Galena Park and Sweetwater, Texas both of which are under the jurisdiction of this witness. USG generally arranges for the transportation of shipments originating at Galena Park; although, on some occasions, the buyer may use private carriage to pickup commodities at this location. USG manufactures and sells basic building materials and related materials to the building industry. The company requested applicant to file and prosecute this application and also requested the use of the commodity description herein involved. From Galena Park, the company ships the following commodities:

(1) Gypsum wallboard—this is a compressed gypsum board having a paper finish manufactured in

sheets, two of which are banded together by paper to make a "bundle" or "book". The commodity is manufactured in various sizes and shapes for example, 2 to 4 feet in width and 2 to 16 feet in length. The basic sizes of this commodity are 4 feet by 8 feet or 4 by 10 or 12 feet. Specialized types of wallboard are listed hereinafter: (a) Core board—used to make partition walls (b) Face panels—used in finish walls (c) Shaft wall—manufactured in two inch thickness and used in the construction of elevator shafts, (d) Shiplap, manufactured in two inch thicknesses and used in roofs and roofing, (e) Gypsum sheathing—used for exterior siding and is shipped in size 2 feet by 8 feet. All types of gypsum board are unitized, generally in units consisting of 25 bundles (double sheets) weighing 2500 to 3000 pounds per unit. The commodity is bundled for ease in handling for reasons of economy. Wallboard is handled at all times by fork lift by USG and the units of board books are generally not banded because banding is not necessary if the unit is handled properly. The smallest bundle (double sheet) weighs approximately 125 pounds and is difficult to handle manually without damage to the board. The company considers it necessary to handle wallboard mechanically because of the inherent nature of the commodity. Wallboard is generally shipped in truck load quantities, occasionally with incidental construction materials moving in the same load.

(2) Gypsum studs—used in place of wooden studs, this commodity is manufactured in sizes ranging from two inches by four inches in width to eight feet to sixteen feet in length. The commodity can be handled manually in individual pieces.

(3) Gypsum board paper—this paper is shipped in rolls weighing approximately 4000 to 5000 pounds, the paper being made of special types of scrap paper. USG produces approximately 3000 to 4000 tons of this paper per month which paper is used as a facing for wallboards. USG ships paper rolls to other USG plants and to competing gypsum company plants. Scrap paper for the production of paper rolls is purchased throughout the United States and occasionally from sources within Texas. The manufactured paper rolls are handled mechanically by fork lifts having a device to poke through the core of paper roll. When placed on trailers, the roll is kept in place by a floor cradle and the roll is loaded length wise on the trailer between the cradles. Large rolls of paper are of an economic necessity in order to keep production of gypsum board running for as long as possible. These rolls are generally five feet in width and from six to seven feet in diameter. USG does not manufacture rolls of paper in sizes of less than 4000 pounds in weight. The commodity generally moves in truck load or car load volumes.

(4) Steel dry wall studs and runners and steel clips and screws. The steel studs are approximately the same size as a 2 by 4 piece of lumber and are used much in the same manner. The studs are stacked on wooden pallets in units weighing approximately 1500 to 2000 pounds and are unitized for safety of handling. The witness testified that the steel utilized in the stud manufacture is a light, soft steel and when shipped loose can be bent or otherwise damaged. The palletized units of studs are handled by mechanical means. These studs are manufactured and custom ordered insofar as length is concerned. They are generally shipped in lengths of three feet to fifteen feet. The palletized units

are banded and contain approximately 400 to 500 pieces. Steel studs are generally shipped in truck load quantities and the other commodities such as runners clips and screws are shipped in LTL quantities as incidental part of the stud shipment.

(5) Lime—lime shipped by USG is used in the manufacture of mortar for brick layers. It is shipped packed in 50 pound paper bags on pallets. This lime is a fine powder material like talcum and if bags are handled often, they will break scattering the lime. For this reason, the bags are palletized and mechanically handled. This commodity moves either in truck load lots or LTL as part of the shipment of other commodities. It is loaded and unloaded manually.

(6) Items incidental to dry wall systems: The company also ships various items to fill out a full wall board system such items generally being shipped as part of larger shipments. Some of these items are wallboard tape, shipped in cardboard boxes approximately 18 inches by 20 inches; joint treatment, shipped in pails, screws in small boxes and used to attach wallboards to walls; molding plaster in bags (50 pounds) and molding plaster shipped in pails or bags; plastic retarder (presumably shipped in pails). Many of the items listed under 6 above are not manufactured at Galena Park but are stored there and shipped as part of a shipment of wallboard on other commodities.

The company maintains sales offices at Houston, San Antonio, Beaumont, Bryan, McAllen, Corpus Christi, San Angelo, Waco, Odessa, El Paso, Amarillo, Lubbock, Fort Worth, Tyler and Hurst. The company sells its materials to two types of customers, dealers (usually lumber yard) and applicators (usually con-

tractors). The company has customers of both types located throughout the State of Texas. Some representative destination points to which shipments either have been made or may be made are Brownsville, Corpus Christi, Houston, Galveston, Beaumont, Athens, Tyler, Longview, Texarkana, Dallas, Fort Worth, Temple, Waco, Austin, San Antonio, McAllen, Laredo, San Angelo, Brownwood, Wichita Falls, Abilene, Midland, Odessa, El Paso, and Amarillo. The shipments could be made to practically any point in the State of Texas.

The company has a plant capacity at Galena Park for wallboard of approximately 600,000 square feet per day. The total capacity of the Galena Park plant for all commodities mentioned above will be approximately 200,000 tons per year. The company requires the type of specialized service proposed by the preceeding witness. It considers the aeroquip method of tying down loads to be a proper and efficient way of tying down a load. Steel studs, as opposed to wallboard, are generally not strapped down to the trailer. This commodity is generally banded to a pallet and stakes are placed around the trailer to hold the pallets. The company prefers the use of rub rails on trailers to transport these commodities.

In addition to its Galena Park plant, USG maintains a plant at New Braunfels for the manufacture of lime, a plant at Corsicana that manufactures mineral wool insullation material; a plant at Dallas which manufactures paint; a plant at Fort Worth which manufactures formica; and a gypsum product plant at Sweetwater. The company also maintains various warehouses through out the State. The specialized wallboard commodities, steel studs and lime described

above may be shipped to points closer to Sweetwater than to Galena Park. Neither the specialized wallboard commodity nor the steel studs are manufactured or stored at Sweetwater. The company also has returned shipments to Galena Park generally consisting or refused, damaged or mistaken shipments.

The company also contemplates the use of the applicant on raw materials moving into Galena Park. One example of such raw material would be the scrap paper used to manufacture the gypsum board paper rolls. This paper generally moves in bails bundled together by steel straps and weighing approximately 2000 to 3000 pounds per bail. Shipped in this form, the commodity is laoded and unloaded mechanically.

Outbound, the company proposes to tender Coastal approximately 20 loads per week in unregulated commerce in the Houston area. It would tender approximately 18 to 20 loads per week in regulated intrastate commerce and 10 to 15 loads per week in regulated interstate commerce.

The company requires timed deliveries be made. Approximately 80% of the companies orders fall into this category. Timed deliveries are often necessary as contractors have made arrangements for mechanical devices to unload the commodities shipped at a jobsite, and delivery must coincide with the availability of this equipment.

The company considers prompt dependable transportation services necessary for the company to successfully sell its products. In the past, the company has used protestant Lake for the transportation of its commodities as a contract carrier from Galena Park to points within a radius of 400 miles of Houston. The

company considers the 400 mile limitation of Lake's authority to have been a hinderance in sale of the specialty board products described above. The company has not been able to market these products properly to points in Texas outside the 400 mile radius. The company also believes that the lack of interstate authority has hindered its overall sales program from Galena Park. The same would be true with respect to the steel items shipped from Galena Park.

Lake first acquired the authority to serve the Galena Park plant around the first part of 1964. USG ceased using Lake's service approximately November 12, 1970, as USG's contract with Lake was cancelled effective that date. According to this witness, USG has had problems in the past on various occasions securing equipment from Lake.

With regard to problems on securing the equipment, the company did not maintain specific records from 1964 till the present. Beginning in 1967, the witness stated that Lake did not always furnish equipment as required. In addition, USG spent some effort during that year trying to have Lake Transport expand its authority beyond 400 miles and into interstate commerce. In the opinion of the witness, Mr. Joe Cain, the owner of Lake Transport, was reluctant to expand into interstate commerce. Davis in December, 1967, recommended to his home office that it was his opinion that USG's long range objectives for the Galena Park plant could not be accomplished by the continued use of Lake Transport. At that time, it was recommended that another carrier be secured as soon as possible. It was Davis' impression that Mr. Cain was unwilling to expand into interstate commerce because of his unfamiliarity with the Rules and Regulations regarding

that character of service. Some of the problems, according to Davis, encountered with Mr. Cain with regard to expanding into interstate commerce were certain interstate rules precluding service to certain destinations and the level of rates proposed. In March, 1970, Lake offered to expand its service to interstate locations and increase its radius in Texas.

The equipment problems about which Mr. Davis testified are as follows:

(1) On August 8, 1968, USG made a shipment to Fort Worth Lumber Company in Fort Worth, Texas. The truck arrived on Monday instead of the requested delivery date on the Friday preceeding.

(2) In August, 1968, USG had a series of problems with the carrier not furnishing proper equipment. One such problem occured on August 20 when a note from the Galena Park manager stated that there were no trucks available at Galena Park for an August 21 delivery. One load to Weiner Lumber Company in Dallas, three loads for Casa Linda Lumber Company at Dallas, two loads to Kuhn Bros. in Dallas and one load to Grogan Lamb were not made August 20, upsetting the named customers. This information was received by Mr. Davis in a wire from Mr. Lee Huffman of USG's Atlanta office.

(3) August 28, 1968, a complaint was registered about an unregulated movement within Houston.

(4) On March 31, 1969, Lake and Bilbo were out of trucks for April 1, 1969 deliveries. Two orders before April 1, 1969 shipments were turned down by USG for that reason. On March 31, Lake furnished thirteen trucks and Bilbo furnished two trucks.

(5) On April 1, 1969, Lake handled only eight loads and Bilbo furnished none.

(6) On April 3, 1969, the company had eight loads to tender. Lake advised that it could handle only six and Bilbo did not advise that it could handle any.

(7) On April 4, USG had 11 loads to tender, Lake could handle only six and Bilbo could not say if he could handle any loads.

(8) On April 4, 1969, USG considered it was having problems trying to get service to Brownsville. In the opinion of Mr. Davis, Cain did not want to handle Brownsville deliveries and recommended to Davis that distribution policies be changed in this period and that rail delivery be used to Brownsville. Among other suggestions, Cain requested the right to load 24 hours a day during this period and to ask customers to unload around the clock. At about this period of time, Davis attempted to secure equipment by lease for use by Lake Transport.

(9) For five weeks prior to April 7, 1969, on 11 of fifty days, Lake could not furnish equipment for service to the Dallas/Fort Worth area. During this period, Lake Transport was used as a primary carrier and Bilbo Truck Lines as a backup carrier. During this period, Lake was not able to handle approximately 60 loads tendered.

(10) On February 12, 1970, Lake delivered a load to Lyon-Gray Lumber Company in Dallas at 2:00 p.m. when the load was requested to be delivered at 7:30 a.m. that day. Davis testified that the load was badly shipped and required two hours extra for unloading.

In Davis' opinion, the load shifted because it was not properly tied down to the trailer.

(11) On July 2, 1970, Zarsky Lumber Company complained about receiving two loads that had shifted at Corpus Christi.

(12) Mr. Davis produced a letter from Cain dated August 17 stating that as of 4:45 p.m. on August 17, 1970, Lake was not in a position to handle either intra city or inter city shipments. Davis testified that he checked with his loading superintendent on that date who confirmed that Cain had told him earlier that it had no more truck equipment and that he had had to ship other orders by Bilbo.

(13) On September 1, 1970, according to Lake's dispatcher, the company was out of equipment, and other loads were shipped by Bilbo.

(14) On September 4, 1970, a load was shipped by Lake Transport to Lyon-Gray Lumber Company at Dallas and delivery was not made till September 8, 1970. The customer complained that the tie down ropes on the load had cut into the top three pieces of each stack of wallboard.

(15) On August 25, 1970, on a rush shipment to Lyon-Gray, Lake and Bilbo could not furnish equipment. The load was ultimately handled on leased equipment from Coastal Transport Company.

Approximately July 25 or 26, 1969, Davis received information that Lake Transport was the subject of a proposed sale by Mr. Cain. This concerned USG as it wants to know who is going to haul its materials. Responding to the information, the witness called Mr.

Cain on July 29, 1969 and asked him about the proposed sale. On that day, Cain advised that he had not been able to make a deal to sell the company and it would advise USG if a sale were made. In March, 1970, Davis was advised that Cain was again attempting to sell his company. This information was received from Mr. McClure of Gypsum Transport at Sweetwater.

Shortly after this occasion, Davis asked Gypsum Transport whether it would buy Lake Transport or file an application to serve the USG plant. McClure did not feel that the operation would fit the scope of his existing business but recommended Coastal Transport to Davis. On or about the middle of May, 1970, Davis contacted Atwell and requested that he meet him at Sweetwater to look over the Gypsum Transport Carrier operation. During the sweetwater meeting, he again requested Atwell to look over the equipment and make a proposal to USG.

On May 21, 1970, Atwell visited Davis's office where Davis explained the entire USG operation to him. Shortly thereafter, Atwell indicated his willingness to file an application to serve the USG facility. Thereafter, the application was filed and subsequently an interstate application was filed at USG's request.

USG considers it to be an advantage to have a carrier that can serve in both intra and interstate and unregulated commerce from Galena Park plant in order to take full advantage of the geographical location of this plant.

Davis testified that the contract with Lake was cancelled because of the difficulty USG had encountered with Lake's service. Since the date of cancellation, all

intrastate regulated shipments have been handled by Bilbo Freight Lines. Unregulated shipments have been handled primarily by Coastal Transport Co. Bilbo has been handling the intrastate shipments with equipment leased from Coastal. The leases were executed at USG's request.

Davis testified that Bilbo had not been able to supply equipment at the time and in the manner required both before and after the cancellation of the contract with Lake. He considers that the use of Bilbo's service with leased equipment not to be a permanent solution to his transportation problem because he cannot get equipment required under the present arrangement. The company does not consider the service of Lake rendered to it to be adequate or satisfactory. The company testified that on occasion it would have a need for the proposed split delivery service of Coastal. The company ships mixed loads.

The company has shipped at least one shipment by intervenor Production Transport, Inc., probably in August, of 1970. This was a shipment of a steel item described previously. Mr. Davis testified that Lake Transport had indicated to him that it did not have authority to transport the steel items here involved. The company testified that it had a need for a carrier that could handle both gypsum board products and all other commodities described in mixed loads.

It is Davis' testimony that the outcome of this proceeding would have no effect on the future use of Lake Transport. As far as USG is concerned, the contract with Lake has been cancelled and the company would enter into private carriage in the event the application is denied.

CROSS EXAMINATION

The witness does not know of any commodity that can be received at its Galena Park plant that would not fall within the commodity scope of this application. On cross-examination, it was pointed out that John Murphy of USG appeared in support of Lake's original contract carrier application and at that proceeding testified that his company was going into private carriage if it did not have that application granted. V. C. Bilbo has been transporting this company's commodities under its authority to transport heavy building materials and supplies. During the period of time when Lake Transport conducted operations for USG, it handled in excess of 14,000 shipments. With respect to the service complaint of August 8, 1968, denoted number one on page 11, Davis identified a letter written by Cain to the consignee of the load apologizing for late delivery. With respect to the complaint of August 28, further examination of the documents underlying this complaint reflect that the number of loads available intrastate versus the number of loads available in unregulated carriage is not determinable. With respect to the March 31 complaint noted on page 12 of this report, the witness did not know where the two loads turned down were destined or whether they were unregulated loads.

With respect to the complaint of April 1, 1969, Central furnished two trucks for local delivery. The witness has not made a thorough investigation into the availability of flat bed equipment for hauling its products from the common carrier motor carriers in Houston.

With respect to the two or eight loads on April 3,

1969, that Lake could not handle, the witness does not know whether these loads were transported or if they were, by whom.

With respect to the problem concerning Brownsville, this involves some 25 loads on or around April 4 moving to that point. This was an unusual situation with respect to the number of loads moving to one place at one time.

The witness testified that on occasion his company changes its prices and during the period immediately prior to a price change, demand for the products it ships is substantially higher. The witness recalled that there may have been a price increase pending on or about April 4, 1969.

The Sweetwater plant of USG manufactures gypsum wallboard, plaster, expanded pearlite and warehouses a number of other products. Shipments of wallboard to San Antonio, Austin, Waco, Dallas and Fort Worth move from the Sweetwater plant in the majority of instances although some shipments are made to these points from Galena Park. The witness testified that he had never made a shipment of wallboard from Galena Park to El Paso, Abilene or Amarillo. These points are not within the 400 mile radius of Lake Transport authority. The cost of raw materials to manufacture wallboard is much cheaper at Sweetwater than it is at Galena Park. For this reason, shipments from Sweetwater may be made greater distances than they can from Galena Park.

The witness was not familiar with any complaints filed by his company against Lake Transport for damage to its product. Gypsum Transport service from

Sweetwater has been satisfactory. Contrary to the previous witness, Mr. Davis believes that this company uses aluminum floor trailers rather than wooden floor trailers. The company has also tendered Merchants Fast Motor Lines gypsum board from both Houston and Sweetwater.

Some of the bills tendered by USG in this proceeding indicated that it had tendered shipments of its steel items weighing as little as 240 pounds to common carrier motor carriers. The company has made a limited investigation to determine which carriers now based in Houston can handle the steel products herein involved. Mr. Davis testified that a single piece of steel stud varying in length from 3 to 15 feet can easily be handled by a man. The same is true of its other metal products. Shipments of the steel products have been made to Dallas and Texarkana. The witness could not recall any other points to which shipments of these commodities have been made. He did recall one mixed load of wallboard and steel in 1970. Only a small percentage of shipments made by this company would be mixed shipments.

Scrap paper used to manufacture paper rolls generally moves by rail for economic reasons. The outbound movement of paper rolls is approximately 90% by rail. Merchants Fast Motor Lines have handled most of the motor carrier shipments of these rolls. The witness complains that these shipments had to be loaded in van type equipment which is not as desirable as a flat-bed because of the quantity that can be loaded. The witness believes that his company has filed some claims against Merchants for damage to its shipments of the paper rolls.

The witness has discussed with the president of Lake Transport the possibility of utilizing very specialized types of equipment i.e. equipment that will load and unload itself.

With respect to the witness's testimony that his company became dissatisfied with Lake Transport in 1967, he was asked on cross-examination about his utilization of a film strip depicting Lake Transport's operation in Houston. The witness had congratulated Cain upon the film strip.

As of November 1, 1970, USG ceased allowing customer pickups at the Galena Park plant. The witness estimated that approximately 40% or less of wallboard shipments are hand unloaded with the remainder being mechanically unloaded.

The witness testified that there was a price increase pending in August, 1970. In the August, 1970 period, the company had a continuous volume of business for several weeks. With respect to some 213 bills covering a period from August 15, 1970 through August 31, 1970, two interstate bills were included as well as one unregulated shipment consisting of a mixed load of wallboard, joint compound and tape and one mixed shipment of wallboard and molding plaster moving by private carriage. Four of the 213 shipments consisted of paper moving from Galena Park to Sweetwater. Sweetwater was the most distant point from Galena Park for which a shipment was made during this period. During this period, USG used the services of Lake Transport, Coastal, Bilbo, Missour-Pacific Transport Co., Merchants, Southern Pacific Transport Co., Kingham Delivery Service and Alamo Express. Kingham Delivery Service is a local cartage company in Hous-

ton. Three steel stud shipments were made to Austin during this period by Missouri-Pacific Truck Line. Out of the 213 shipments, 3 required stops for partial unloading.

USG would tender the applicant only truck load or substantial truck load shipment of the commodities involved in this application from Galena Park. The witness does not consider the existing lease arrangement with Bilbo to be satisfactory because Bilbo cannot supply enough equipment and does not have the complete authority both intra and interstate thought necessary by this company to render a complete service.

To element detention charges, the witness testified that his company had agreed to pay Coastal 17 cents per hundred on unregulated movements in Houston and had made the same deal with Lake Transport on unregulated movements, the 17 cents being one cent higher than the previous rate. In unregulated service, Coastal has handled shipments from Galena Park to Houston, Baytown, South Houston, Channelview, Pasadena, Deer Park, Oak Forest and Cosby. From a further search of his record, the witness discovered a shipment made by Merchants Fast Motor Lines to El Paso, such shipment consisting of dry wall studs and weighing 3570 pounds.

The witness testified that in March, 1970, Cain, Huffman and Davis met in Dallas, at which meeting Cain offered to file such interstate applications as USG desired and for statewide intrastate authority from Galena Park in Texas. It was Davis' position that Cain should not proceed with the applications at that time.

Lake did secure emergency authority to transport

gypsum products from Galena Park and handled certain loads to Louisiana and Mississippi.

SUBPOENAED TESTIMONY

V. C. Bilbo, Jr. of Dallas, Texas, owner of Bilbo Freight Line and Bilbo Transport Co., Inc. appeared pursuant to subpoena. Mr. Bilbo testified that that portion of certificate no. 3047 authorizing the transportation of heavy building materials, machinery and supplies, authorizes his transportation of the commodities of USG from Galena Park. This is a limited common carrier certificate. The home offices of the Bilbo Companies are in Dallas and Bilbo does maintain a terminal in Houston. Since 1963, Bilbo has participated in the movement of gypsum products from USG's Galena Park plant. Primarily the commodities handled have been wallboard with dimensions of four feet by eight feet by one half inch. The transportation of this commodity has been on flat bed equipment with wooden decks. Mr. Bilbo believed that during the year 1970 he had surplus equipment in the Houston area. He also had units that unloaded in the Houston area and returned northbound empty during this year. Mr. Bilbo testified that his company leased equipment from Coastal pursuant to request of Forest Davis of USG. The initial leases of three units were cancelled at the request of Mr. Atwell so that he could determine the legality of these leases. At the time of hearing, Bilbo had six units of equipment leased from Coastal. Pursuant to these leases, 75% of the revenue derived from the equipment is paid to Coastal. Bilbo carrys insurance on these units and pays the drivers. He also withholds income tax, and social security for the drivers.

Appearing subject to subpoena was Mr. John P. Gately, district sales manager of USG at Houston. The territory of his responsibility is roughly a 100 mile radius of Houston. The witness has been familiar with Lake Transport and Joe Cain since the company's inception in 1963. This witness has never requested Lake Transport to purchase different equipment or facilities from those employed by the carrier. The witness stated that in 1967 he concurred with Mr. Davis that Lake Transport should be phased out.

The witness is also familiar with some of the company's customers who hand unload and is familiar with the fact that some of the company's customers hand unload gypsum wallboard but could not name specific name specific customers that did so. During the third quarter of 1970, Galena Park sold 13 million feet of wallboard, approximately 200,000 dollars worth of dry wall steel and less than 50 tons of packed mortar lime. Thirty three percent of the 13 million feet would have originated at Sweetwater. From Exhibit 12, a listing of the commodities shown on the USG bill of lading, the witness identified the following products which have been shipped from USG within the past two years: Plaster retarder; plaster accelerator; gypsum wallboard; plaster board; gypsum lath; gypsum backing board; gypsum sheathing; structural gypsum panels; lathing or rubbing, expanded steel; channels furring or studing iron or steel; plaster or wall grounds, steel, galvanized, plain or primed, nails, screws, lime, pasterboard joint system; tape, wallboard, paint, cold water, paste, meaning ready-mix joint treatment, cement compound, compounds, paint lacquer, gum, varnish or resin, wallboard cement, wallboard (other than plaster board), wallboard, fiberboard, pulpboard.

Neither fiberboard nor pulpboard are made of gypsum.

Mr. A. H. Fleming, agent in charge of the Motor Carrier Lease Section and official custodian of license and weight reports for the Department of Public Safety appeared pursuant to subpoena. Mr. Fleming testified that some 120 cases were prosecuted against Coastal Transport in the year 1970 to the date of the hearing. In each of the cases, with the exception of five, there was a fine imposed. The total amount of fines paid during the year were amounted to $4585. Mr. Fleming was asked some questions regarding the lease law which the Examiner did not feel to be proper and will not be discussed at this point. To Mr. Fleming's knowledge, Coastal is a safe and reliable carrier. Mr. Fleming considered the number of violations to be above average for the type of carrier involved.

Mr. Richard Atwell, son of Mr. Atwell who proceeded him on the stand, appeared pursuant to subpoena. Mr. Atwell is presently employed by Bilbo Freight Lines in Dallas, Texas, as a truck driver. The witness is stationed in Houston. The witness owns stock in both F press, Inc. and Coastal Transport, Inc. Mr. Atwell entered the employ of Bilbo Freight Lines on December 1, 1970; prior to that he was employed by Coastal. At Coastal, the witness occupied the position of assistant to the operations manager. The witness has delivered two loads for USG since his employment with Bilbo. On December 2, he handled a load to Corpus Christi and December 4, handled a shipment to Kingsville. The witness testified that on one load handled by Bilbo with the Coastal equipment, the load shifted so that the headboard of the trailer was damaged. The rest of the witness's testimony is considered by the Examiner either immaterial or inconclusive.

PROTESTANTS PRESENTATION

Mr. Joe P. Cain of Houston, Texas, president of Lake Transport, Inc., Lake Truck Lines, Inc. and Production Transport, Inc. appeared for protestants. Lake Truck Lines is a Texas corporation doing no motor carrier business at this time. Lake Transport, Inc. hereinafter called Lake holds contract carrier permit 12058 which authorizes, as pertinent, the transportation of plaster and plaster products, gypsum and gypsum products in sacks, bags and other containers, gypsumpaper, wallboard and sheathing over irregular routes and on irregular schedules on call and demand from the facilities of the United States Gypsum Company at Galena Park, Texas, to all points in Texas within a 400 mile radius of Galena Park, Texas, and vice versa to United States Gypsum Company. This authority was obtained by original application in 1964. The company had operated this authority until November 12, 1970. Lake maintains a terminal in Houston approximately ½ mile from the Coastal Terminal located on ¾ acres of land. The terminal facility consists of office, shop, fueling island and parking area. At this terminal, Lake performs minor maintenance work and contracts its major repair work with truck manufacturers and truck dealers in Houston. All dispatching is accomplished from this terminal by a full-time dispatcher.

The trailer equipment operated by protestant is what is nown as an inside stake pocket rub rail trailer. As opposed to the aeroquip nethod of securing loads, adopted by Coastal, protestant uses heavy duty ropes secured to hooks beneath the bottom of the trailer to secure a load. They also have stake pockets for stakes to hold loads of commodities such as the steel men-

tioned heretofore. It was the witness's opinion that the rope tie down method had proven to be entirely satisfactory. The protestant in about 1964 attempted to use a strapping like the aeroquip but gave it up after a short try because it did not secure the load properly, it cut the edges of the wallboard transported, and was expensive in comparison to roping. Approximately two years prior to the hearing, the witness tried to use an aeroquip method again but had no success with it.

The company uses a two piece tarpaulin and every trailer is equipped with tarpaulins. Its method of tarping lading has proven to be satisfactory. The witness testified that his company had not received a complaint from USG about the type of equipment it utilized.

As Exhibit No. 44, protestant introduced its operation control chart, a dispatching form, which, among other things, generally reflects the destination of a given load, its arrival time and date, and the general availability of equipment on a given date. Exhibit No. 45, is another form called a driver trip ticket which, among other things, gives information whether a particular load was mechanically or hand loaded and unloaded and exact times of loading and unloading particular loads. Exhibit No. 46, entitled Customer Service Form, reflects, among things, whether the consignee of a load considers the service to be satisfactory or unsatisfactory, the time the truck arrived for unloading, time unloading started and time unloading completed. These forms are signed by the customer, presumably at the time the load is delivered.

The overwhelming majority of shipments handled by Lake for USG have consisted of shipments of wallboard and sheathing. The witness could not recall

handling any mixed shipments of wallboard and the other commodities shipped by USG. The majority of the wallboard shipments by Lake have been of wallboard in sizes 4 by 8 and the majority of sheathing loads have been in sizes of 2 by 8.

Insofar as the witness can remember, he has never been tendered a load of insulating blankets, molding, plaster, tape, multipurpose texture finish, joint compound, gypsum studs or shaft board.

Protestant Production Transport, Inc. holds a specialized motor carrier certificate from this Commission which authorizes, among other things, the transportation of steel items statewide. Three loads of steel studs had been tendered to Production Transport, two to Austin and one to San Antonio, within 90 days prior to the hearing. The company received no complaint about the manner in which these shipments were handled.

In 1967, protestant operated 17 tractors and 21 trailers. At the time, 8 of the tractors and nine of the trailers were owned by Lake Transport, Inc., eight of the tractors and twelve of the trailers were owned by Lake Truck Lines, Inc. and one tractor was owned by Production Transport, Inc. In 1968, the figures were approximately the same as in 1967. In 1969, two to four tractors were sold. Beginning in 1970, the company operated 13 to 15 tractors and 21 trailers. Tractors were still equally divided between Lake Transport and Lake Truck Lines, Inc. In 1970, the authorities of Lake Transport and Lake Truck Lines were combined, with Lake Transport, Inc. being the surviving operating entity. In 1970, protestant began selling some of its equipment so that at the time of hearing, the company

had six tandem tractors and three single axle tractors and 16 trailers. Equipment utilized by Lake Truck Lines in the past was primarily utilized under a contract with Olin Matheson for the transportation of fertilizer. However, these pieces of equipment were also available for use by Lake Transport, Inc. for the transportation of the commodities of USG at Galena Park. Protestant attempted to keep enough equipment on hand to handle the normal day to day business of both of its contract shippers; although, he could not handle all of the loads with its equipment during peak periods of demand. According to this witness, the peak periods in USG's business occured about twice a year during the periods of price increases.

Early in the company's experience with USG, during the rush periods, the cooperation of USG was such that practically all loads could be handled without difficulty. In this witnesses opinion, the coordination between USG and Lake deteriorated in later years so that several hundred loads would be tendered within a few days making delivery of all impossible. During this later period of time, and during the peak rush periods, protestant adopted a method of setting up a cut off time during a day after which time no more loads would be accepted for that day.

During the peak rush period, protestant has attempted, at various times, to lease additional trucks and to lease land for the storage of loaded trailers that could be hauled as tractors became available.

Based on information derived from its operational control charts (Exhibit 44, for example) protestant introduced Exhibits 47, 48 and 49 intended to show the degree of equipment utilization by USG for the period

June, 1969 through October, 1970. The information from its exhibits which the Examiner considers pertinent, is tabulated below. The Examiner understands the heading intercity runs to mean regulated intrastate runs, city runs to mean unregulated runs within the Houston commercial zone, total runs to be the combination of regulated and unregulated runs, units not loaded to be units available for loading during the month but for which no loads were tendered, days when loads tendered equalled or surpassed loading capability to be self explanatory and days surpassed loading capability and days for which the protestant admits that more loads were tendered than trucks were available.

	Inter-City Run	*City Run*	*Total Runs*	*Units Not Loaded*	*X-47 Days when equalled or surpassed loading capacity*	*X-48 Days surpassed loading capacity*
June '69	80	102	182	108	3	0
July '69	85	96	181	110	4	1
Aug '69	107	157	264	134	2	0
Sept '69	60	66	126	202	2	0
Oct '69	86	81	167	102	4	0
Nov '69	99	106	205	97	5	1
Dec '69	127	131	258	126	5	0
Jan '70	43	82	125	144	2	0
Feb '70	61	90	151	94	1	0
Mar '70	61	119	180	91	6	2
Apr '70	77	129	206	61	11	8
May '70	65	111	176	153	3	1
June '70	93	178	271	185	2	0
July '70	52	102	154	165	0	0
Aug '70	183	65	248	141	10	6
Sept '70	172	5	77	62	7	3
Oct '70	52	0	52	95	2	0
TOTAL	1503	1620	3123	2070	69	22

Exhibit 48 reflects that approximately 3% of the loads tendered to protestant during the period shown were loads where fork lifts drove onto the trailer to load. The other 97% of the loads tendered were loaded from the side and the fork lift did not drive upon the trailer.

The witness testified that normal loading times for USG's Galena Park plant are 8 to 5, five days per week.

During rush periods, the company either runs two shifts or operates 24 hours a day 7 days a week.

On March 10, 1970, a meeting took place between Forest Davis and H. Lee Huffman and Cain. According to Cain, this discussion centered around the possibility of Lake extending its intrastate authority to several states surrounding Texas. At this meeting, it was also agreed that Lake needed more tonnage. Cain evidently expressed his willingness to file the necessary application but, in his opinion, Davis was reluctant to do so. Subsequently, in June, Cain met with Davis in Dallas at a TMTA convention and Davis asked Cain to consider eliminating detention charges on unregulated city movements and adjust their per hundred weight rate accordingly. Cain also requested copies of I.C.C. Tariffs used by other companies serving USG be given him so he could consider these rate proposals.

As a contract carrier, Lake must charge as a minimum the rates of the motor common carriers pursuant to Article 911b. The Common Carrier Tariff includes a provision for detention charges and Lake charged the proper detention charge when applicable. Several carriers who have been operating under contract carrier authority prior to this year have converted their authority to specialized motor carrier. Subsequent to these conversions, the Commission has adopted its MCT Tariff No. 4 which includes rates for the involved commodities for specialized motor carriers. This tariff has approximately the same detention provision as does the common carrier tariff series 25. For unregulated hauls, Lake in the past had charged $7 per hour for detention after a three hour free period. It has been the practice of Lake to bill detention separately from

freight charges. For intrastate regulated transportation, the prescribed tariff detention charge was made, i.e. four hours free time and $4 per hour thereafter. Tariff 25 and Tariff 4 provide for $3.82 per hour for detention with appropriate rules governing the computation of this amount. Applicant's interstate tariff has a detention provision identical to that in tariffs 4 and 25.

Exhibit No. 103 introduced by protestant is a series of letters dated respectively November 26, 1969, June 6, 1969, December 13, 1968, November 20, 1968 and October 10, 1964. The letter of 10-8-64 is interoffice communication between the Chicago and Dallas traffic offices of USG indicating the company's desire to expand its truck service from Galena Park into Louisiana and perhaps Arkansas. The Chicago office directed the Dallas office to obtain a proposed rate from Lake Transport. The November 20, 1968 letter is from Mr. Murphy of USG to Lake Transport concerning a rate proposal for interstate service submitted to USG by Lake. Mr. Murphy points out his company's refusal to accept the interstate rate proposal, specifically with respect to its detention provisions. The letter of December 13, 1968 from Mr. Murphy to Lake Transport is very similar to that discussed immediately above. Letters of June 6, 1969 and December 26, 1969 are letters of support for emergency interstate authority for movements from Galena Park to New Orleans, Louisiana and Vicksburg, Mississippi.

Exhibit No. 104, sponsored by protestant is a series of letters passing between Lake and USG with respect to the possibility of Lake instituting interstate service from Galena Park. The letters range in date from

October 17, 1968 through June 17, 1970. Without going into unnecessary detail, the Examiner notes that these letters from 1964 through 1969 generally point up the efforts of the parties to reach an agreement and their inability to do so on the level of rates and charges which would be made by Lake if it were granted interstate authority to serve Galena Park. The primary problems appear to be Lake's proposed detention charges and the disagreement of the parties over the interstate hours of service requirements, as they effect the proposed rate structure. The 1970 letters reflect the carrier's willingness to file for interstate authority and to expand its intrastate authority to handle what steel items may be shipped from Galena Park.

Exhibit No. 105, sponsored by protestant, is a series of letters requesting payment for detention charges. These letters span the period from 1964 through 1970 and about the request for payment, the witness commented that originally he had had to write often about past due detention charges, but within recent years USG's payment of such charges had been prompt. Approximately half of the requests for payment of detention charges reflected in Exhibit No. 105 relate to charges incurred in unregulated city movements of the involved commodities. Exhibit No. 107 is a series of correspondence, generally from USG officials to Lake Transport, Inc. regarding detention. These letters, especially the ones in the two or three year period prior to the hearing, just refer to questions about specific detention charges. The Examiner does not consider the letters to be particularly material to any issue in this proceeding.

Exhibit No. 108, sponsored by protestants, is a series

of letters written in 1969 and 1970 from Mr. Cain to USG personnel. These letters detail Mr. Cain's complaint that his company is not receiving a fair share of the intrastate loads shipped by USG. The letters also generally complain of the practice of USG of allowing customers to pick up their commodities in their own trucks. Exhibit No. 109 was a letter from USG to Lake Transport indicating the period in or around the last three weeks of August would be a pre-price increase.

Mr. Cain testified that his company had entered into a contract with USG in 1964 which contained a 12 month cancellation clause. This contract was renegotiated in 1968 and was cancellable on 30 days notice by either party. This was the contract that was cancelled effective November 12, 1970 by USG.

Exhibit No. 111, sponsored by protestant, is a letter from protestant to an Austin law firm requesting proposed charges for filing of an interstate application for the account of USG.

The carrier, Lake Transport, Inc. is willing to reenter into the contract with USG to continue to haul their products, as well as to file such interstate applications as may be requested by USG and to expand its intrastate commodity authority.

Mr. Cain testified that in September, 1970, USG's shipping personnel contacted his company four times concerning their availability for handling certain loads. During this period, after the fourth contact, some loads were tendered. Exhibit No. 10, heretofore identified in the record details the nature of those loads.

On cross examination, counsel for applicant found approximately five bills of lading which indicate that

Lake had handled mixed loads of Gypsum wallboard and some of the other commodities mentioned in this record during the summer of 1970.

The witness testified that three loads of steel handled by Production Transport for USG were all of the loads handled by that company for the year 1970.

The witness estimated for the year 1969, his companies had gross revenues of approximately $600,000. Of the $600,000, approximately $200,000 was derived from operations of USG and $400,000 derived from operations for Olin Matheson Chemical Corp.

From bills subpoenaed by protestant from USG, it was determined that the protestant transported 37 loads to Austin in September, 1970. Twenty three of these loads were moved to one jobsite. During the period January 1 to the date of the hearing, the protestant also hauled one load of sack lime to Odessa and one load of wallboard to Amarillo, both points beyond his authorized territory.

Protestant's drivers are expected to cover 100 miles each three hours. With respect to the film strip request, heretofore mentioned at page ... of this report, Mr. Cain testified that Forest Davis called his office in 1968 and asked if he could get together a group of pictures to take to a USG company meeting in Georgia. He explained that they had a program and that he would desire to display Cain's operation to some of the company people in Atlanta. Mr. Cain produced a slide presentation and a commentary to go with the presentation. Mr. Cain testified that Mr. Davis, after the presentation, congratulated him on the slide presentation and stated that it "went over very big". Immediately subsequent to the June meeting, Mr. Cain ad-

vised Davis that he would up the change in the unregulated rate from 16 cents to 17 cents per hundred and eliminate the detention charge.

On July 1, 1970, Mr. Cain, Mr. Davis, Mr. Huff and Mr. Murphy met together. At this meeting, Mr. Davis and Mr. Murphy advised Mr. Cain that his company services no longer fit into the USG scheme of things. Prior to this meeting, USG had already supported the filing of the instant application.

Exhibit 93, introduced by Mr. Cain, relates primarily to the complaint of USG about Lake's service to Brownsville, heretofore mentioned at Page .... of this report. This correspondence points out that the period of time involved was a pre-price increase with a large volume of traffic moving. In its correspondence, Mr. Cain pointed out that he attempted to hire additional drivers to man his equipment; lease owner operators and contact other trucking companies for aid. To facilitate this, he advertised in a local paper for drivers. In the letter he suggested that rail transportation might be used to distant points such as Brownsville and the valley in order to allow trucks to make shorter runs thereby making more runs in a given period. He also asked if it would be possible to have consignees unload around the clock and on Saturdays and Sundays allowing more runs in a given period of time. It also asks if it is possible for consignees to accept maximum loads and to eliminate timed deliveries during the pre-price increase. In addition, Mr. Cain suggested that he lease land adjacent to his terminal upon which to store loaded trailers so as to eliminate the tie up of tractor units at the plant site.

Cain actually leased the land next to his terminal

from Texaco Pipe Line Company, however, USG never participated in the usage of this land.

The witness at this point outlined his problems with USG in their failure to use his company regularly to various points in the State such as Dallas/Fort Worth, San Antonio, Austin and Waco. It is Mr. Cain's testimony that these points are primarily served from the Sweetwater plant and not from Galena Park, although he holds the authority to serve them. On occasion, Mr. Cain discussed this problem with various of the personnel in the USG traffic department, and according to Mr. Cain, was told that the Sweetwater plant had the cheapest raw material and it was cheaper to ship from Sweetwater into this area than it was from Galena Park. It is Mr. Cain's testimony that his company was called upon to serve these areas in or near Sweetwater only during rush periods.

Mr. Cain considers from his experience the normal territory to which regulated shipments are tendered to be within an arc running through Rusk, Palestine, Hearne, Rockdale, Bastrop, Gonzales, Karnes City, George West and Laredo. Every thing to the east of this line had been served in the normal course of business by Lake from Galena Park. Mr. Cain's testimony that every thing west of this line is served as normal matter from the Sweetwater plant and his company only handled emergency loads into that area. In this regard, Mr. Cain introduced a traffic study for the month of February and March 1969 which indicated that of the total regulated loads tendered by USG to his company for the month of February, 1969, 59 were within the Lake territory and 13 were in the Sweetwater territory, of 69 tendered in March, 1969, 67

were in the Lake territory and 38 were in the Sweetwater territory.

As Exhibit No. 96, protestant introduced completed customer service forms for the period 6-10-70 through 6-24-70. For description of this form see the explanation given to Exhibit No. 46 at page of this report. The witness for protestant considered the period covered by Exhibit 96 to be representative of any other period with respect to the number of shipments handled.

Mr. Cain testified that he had discussed with Forest Davis on several occasions the possibility that Lake might be sold to another carrier. At a meeting held on March 10, 1970, Cain pointed out to Davis and Huffman that Gypsum Transport was considering the purchase of Lake Transport. According to Mr. Cain, at this meeting, Mr. Huffman indicated that he did not want to lose the services of Lake Transport. Mr. Cain was also of the opinion that Mr. Davis did not feel this way. Exhibit 98, a letter written to Mr. Davis on June 17, 1970, indicated Mr. Cain's decision to terminate his attempts to sell his company as his son had decided to enter the business with him. After the July 1 meeting of Cain, Huffman, Murphy and Davis, Cain learned of the application of Coastal Transport and advised USG of its decision to protest this application but to continue to provide service to USG until such time as they ceased using its services.

Exhibit no. 114, is a copy of the contract between Lake Transport and USG under which Lake operated prior to November 12, 1968. On cross examination were pointed at least two instances where Lake varied the

terms of the contract unilaterally, which variances were accepted by USG after the fact.

A further examination of 401 bills of lading for a period April 24, 1970 to June 24, 1970, reflected that protestant handled four shipments to Dallas, five to Fort Worth, two to De Soto, one to Eberman, none to Austin and none to San Antonio.

Mr. John Murphy, heretofore identified, appeared at the request of the Examiner. Mr. Murphy said that in his opinion, based on his past experience over the years with Lake Transport, his company could not reach an agreement with Lake upon which to base a contract for service in interstate commerce. The areas in which the agreement could not be reached were the level of rates and the detention rules proposed by Lake. It is Mr. Murphy's testimony that the rates proposed by Lake were higher than those filed by other carriers serving USG in the same territory and that the detention rules were harsher than those proposed by the other carriers. Mr. Murphy testified that both Gypsum Transport and Coastal Transport have detention rules in their contracts with USG.

Mr. H. H. Rothell, Jr., an Austin contractor, appeared at the request of the protestant. Mr. Rothell testified that he has constructed several buildings, primarily apartment buildings. In his construction projects, Mr. Rothell has had occasion to use wallboard manufactured by USG. He testified that in the course of his jobs, wallboard is stacked outside the construction project, often unprotected from the elements. It was his testimony that wallboard is not covered for protection from rain unless the rain is to be more than a day's duration. It is also his testimony that wallboard

is often unloaded from the delivering trailer equipment by hand. He testified that board up to 8 by 12 has been personally handled by his crews by hand without problem. His crews have also handled the metal studs here discussed by hand without problem.

BRIEFS OF THE PARTIES

In response to the request by the Examiner, both applicant and protestant filed briefs on those points of law that they considered material and crucial to the issues involved in this proceeding. In its brief, applicant asserts the following proposition: (1) Lake Transport, Inc. is not a proper party protestant in this proceeding, and its protest should be stricken and the testimony and evidence submitted by it should be stricken. (2) Assuming for the sake of argument, that Lake Transport, Inc. was a proper party protestant, which applicant denies, the supporting shipper is entitled to the service proposed and the application should be granted. (3) The record shows that the commodities involved do require special equipment for their safe and proper loading, unloading and transportation.

In their briefs, protestant and intervenor argue the following: (1) The commodities applicant seeks authority to transport, to the extent that such commodities are identified, do not qualify for transportation by specialized motor carrier. (2) Protestants are proper parties at interest in this proceeding. (3) Applicant failed to discharge its statutory burden of proving that the service it proposed is required by the public convenience and necessity. (4) Applicant has demonstrated its lack of fitness to receive the grant of authority for which it has applied.

As the briefs were prepared at the direction of the Examiner, and the contents thereof thoroughly reviewed by the Examiner, discussion of the propositions which the Examiner believes to be material will be set forth in his discussion of the evidence and in law hereinafter.

DISCUSSION AND CONCLUSIONS

Obviously, the applicant in this proceeding has the normal burdens imposed by the Motor Carrier Act to prove that the public convenience and necessity require the operations proposed and that the commodities proposed to be transported are the proper subject of a grant of specialized motor carrier authority. The case does present at least one unique feature. That is, whether or not the primary carrier in opposition, Lake Transport, Inc., is a proper party protestant to this proceeding. Lake urges that it is a proper party protestant in that it obviously qualified as such under the Commission's rules as of the date it filed its protest and that the mere act of postponing the hearing until after the date of cancellation of its contract cannot change that status. Applicant urges that Lake's standing as of filing of its protest was not controlling and what is crucial is whether or not it qualifies as of the date of hearing. Applicant further urges that even if Lake is determined to be a proper party protestant, that its status as a contract carrier as opposed to specialized motor carrier entitles its protest a little, if any, weight.

The Examiner does not believe that it is necessary to decide in this proceeding whether or not Lake is technically a proper protestant. Under the Commission's liberalized intervention rules, Lake would obviously

qualify as an intervenor in opposition at the very least. The more difficult question is what weight should be given to the opposition of Lake and the evidence adduced in support of that opposition. The interstate cases presented by the applicant's counsel in applicant's brief would be wholly persuasive save and except for one aspect of Texas Law that differs significantly from the interstate law. In the opinion of the Examiner, Texas has two classes of contract carriers. First there is the pure contract carrier like those in interstate commerce which have by choice elected to dedicate their service to a particular shipper and tailor their services to meet that shipper's unique needs. Second there is a class of contract carrier in Texas that is forced to choose this form of authority because the commodities that it wishes to transport do not qualify as ones requiring specialized equipment for their loading, unloading and transportation. The second type of contract carrier does not and need not exist in interstate commerce as the Interstate Commerce Act does not require a showing that a commodity requires specialized equipment for its handling before a grant of irregular route common carrier authority may be granted. The Examiner believes that this unique feature of the Texas law, i.e., requiring a carrier to seek a contract carrier permit in order to haul certain commodities on irregular routes and irregular schedules to require serious thought be given to the opposition of Lake, which the Examiner believes to be clearly in the second class of contract carrier.

The supporting shipper complains of the service of Lake in the following areas: (1) It has failed to provide equipment at all times requested. (2) It has failed to cooperate in the manner desired in securing addi-

tional intrastate and interstate authority; and (3) Its procedures and method of handling the assessment and collection of detention charges.

Wtih respect to the first of these complaints, the shipper pointed out some fifteen instances which it considers to be service failures in the period from August 8, 1968 through August 25, 1970. In response to these complaints, the protestant produced documentary evidence reflecting the number of loads it has handled for the supporting shipper during the period June, 1969 through October, 1970, and information concerning its equipment availability or lack thereof during every day of the entire period. Lake also pointed out that most of the "service failures" occured during preprice increases when abnormally large numbers of loads were tendered in a short space of time. Lake also cooperated with the supporting shipper during these preprice increase periods in order to handle all the loads in a satisfactory manner. From the evidence, it is the Examiner's opinion that the number of times the carrier was unable to supply all the equipment needed compared with the number of over all loads handled requires the finding that the service of Lake Transport, Inc. has been adequate insofar as the evidence in this record reflects. In fact, Lake has provided what must be termed a superior service to USG.

Be that as it may, several non-service problems have arisen between Lake and USG which have become so serious as to preclude further cooperation and harmony between them. The Examiner refers the reader to the abstract of evidence in this report where he has detailed evidence of the ever widening misunderstanding between the parties over the last few years. As a

general proposition, such problems rarely surface in Commission proceedings as shippers generally have a choice of carriers and simply cease using one when misunderstandings occur. In this instance, however, USG's only dependable and available carrier is Lake Transport and unless another carrier is authorized to serve, USG has no alternative carrier to turn to. For reasons heretofore detailed in his Report and Recommended Order dated August 5, 1968, issued in SMC Docket 7587, Melton Truck Line, Inc., adopted by the Commission, V. C. Bilbo, Jr. is not considered to be properly authorized under Certificate 3047 to transport the commodities here involved from Galena Park. The disagreement between USG and Lake over the matters of detention charges, interstate tariff charges and filing of interstate applications have reached such proportions that it is the Examiner's belief that the company will resort to some sort of private carriage if this application is denied rather than to begin again to use the service of Lake Transport.

The motor carrier act requires that this Commission cannot grant an application for specialized motor carrier authority unless it is established by substantial evidence (1) That the services and facilities of the existing carriers serving the territory or any part thereof are inadequate; (2) That there exists a public necessity for such service, and (3) The public convenience will be promoted by granting said application. As the Examiner has noted, he does not consider the "service failures" complained of by USG to be substantial evidence of inadequacy in the service of Lake. He does not believe the problems complained of in the paragraph immediately above to be material to consideration of adequacy or inadequacy under the Texas Motor

Carrier Act. The act does not require an intrastate motor carrier to file interstate applications or to propose any particular level of rates in an interstate tariff. The Motor Carrier Act, through appropriate tariffs promulgated by this Commission does require a carrier to collect detention charges if such charges are properly incurred. For these reasons, the Examiner believes that the application must be denied if Lake Transport, Inc. can be considered to be an "existing carrier" under Section 5a (d) (1) of Article 911b. The Examiner is of the opinion that Lake cannot be so considered.

As the applicant points out in its brief, a contract carrier has no statutory obligation, apart from its contract, to provide service to a contracting shipper. Likewise, the Commission has no statutory authority to require a contract carrier to serve its supporting shipper or shippers. It follows that as a general proposition the Commission should not require a contracting shipper to utilize a particular contract carrier. The contract carrier permit issued to Lake only authorizes service under a continuing contract with USG. The Commission cannot dictate the terms of the contract between Lake and USG, or for that matter, force the parties to enter into a contract. There now exists no contract between the parties, and at least with respect to USG, no intention to again enter into a contract with Lake. It is therefore the Examiner's opinion that in the absence of such contract, Like is not properly authorized to serve USG, and hence, is not an "existing carrier" within the meaning of Article 911b.

The Examiner is fully aware that reasonable arguments may be made for a position contrary to the one set forth above, and that material harm will result to

Lake as a result of a grant of the authority sought; however, the Examiner believes that regulation of entry of additional competition into the motor carrier field can only be justified by the benefits that accrue to the public thereby. To foster and maintain an economically sound common and specialized carrier system which serves the public generally is one of the primary aims of limitation of entry, and in this case and in the case of most contract carriers, the only "public" involved is the contracting shipper. If, as in this proceeding, the shipper clearly does not want to continue using the services of the contract carrier, the Examiner cannot find that any benefit would accrue to the "public" by denying the entry of the new carrier into the particular field of transportation involved.

Additionally, it is the Examiner's belief that it is not in the best interest of the transportation industry to foster private carriage and for this, as well as all the reasons set out above, believes that the application herein under consideration should be granted to the extent that the Motor Carrier Act will allow. Given the state of the relationship between USG and Lake it would be a useless act to deny this application, and could provide only hollow satisfaction to Lake in that USG would not use its services in any case. The existing common carriers are obviously authorized to transport all the commodities involved in this proceeding, but did not appear in protest. In their absence, the Examiner cannot assume that these carriers are willing and equipped to transport the commodities involved, thus he must assume that their service is inadequate in some respect.

In the opinion of the Examiner the applicant is a fit

carrier to be the recipient of additional motor carrier authority. The Department of Public Safety is charged with the responsibility of enforcing the leasing laws and that is the proper agency to concern itself with the legality or illegality of the lease arrangement between Bilbo, Coastal and USG. The evidence introduced with respect to the number of overweight and similar violations committed by Coastal in the past year are not persuasive to this Examiner on the issue of the applican't unfitness.

In addition to the questions of need and fitness, it is necessary to determine whether or not the commodities involved in the application now qualify under recent decisions as ones requiring special equipment for their loading, unloading and transportation. This Examiner and this Commission have heretofore held in a contested proceeding that gypsum wallboard does require specialized equipment for its loading, unloading and transportation. As the evidence in this proceeding reflects, the commodity is easily damaged by excessive flexing or bending. In addition, the commodity can be easily chipped or nicked around the edges of an individual sheet. USG invariably handles the commodity in a unitized manner employing fork lifts to load and unload it. The evidence reflects that this is done to protect the commodity and to eliminate the cost of manual handling. It is also clear that the commodity can be handled manually and is often handled in this manner by various consignees. However, it is the Examiners firm belief that the commodity is best handled by mechanical means in order to avoid undue damage and from that standpoint does require specialized equipment for its loading and unloading. Over the years, the Commission has held that such items as tarps, straps,

etc., constitute special equipment insofar as transportation requirements are concerned. These items are utilized and must be utilized to transport loads of wallboard and thus the Examiner finds that the commodity does require specialized equipment for its transportation. The foregoing observations would apply with equal force to all forms of wallboard shipped by USG and to gypsum sheathing and gypsum studs. All of these commodities appear to the Examiner to be highly susceptible to damage in handling and although may be manually handled, their unique characteristics dictate that special equipment be utilized for their handling.

The Examiner is also of the opinion that the steel studs involved in this proceeding require specialized equipment for their loading and unloading and transportation. The witness for the supporting shipper testified that the steel utilized was soft in nature and the studs can be bent or nicked if manually handled. The items are palletized and bundled and loaded and unloaded by fork lift. However, the Examiner, after considering all the evidence, has reconsidered his earlier ruling and does not believe steel studs to be the subject of proper notice in this proceeding. A reading of the application as filed would not, in the Examiner's opinion, give notice to the existing carriers that the applicant is proposing to transport steel beams or studs. In addition, it does not appear from the evidence to have been any attempt by USG to utilize the many carriers authorized to transport such items that are located in the Houston area. For reference to a list of carriers authorized to transport this commodity, the reader is directed to the so called "Bewick" proceeding in which in excess of 100 carriers are authorized to carry iron and steel items. Protestant Production

Transport, Inc. has been utilized with apparent success to transport these items and no inadequacy has been shown to exist in its service. For this reason, the Examiner does not believe that the public convenience and necessity requires that the applicant be authorized to transport this particular item.

In a similar category, is the commodity, sacked lime, shipped by USG. First with respect to this item, the Examiner cannot find that it requires specialized equipment for its loading, unloading and transportation. The commodity appears to be palletized merely for convenience and economy. The commodity is shipped in 50 pound sacks and is easily and regularly handled manually. The Examiner can see no difference between this commodity and a commodity such as sacked fertilized which the Commission has consistently held does not require specialized equipment for its loading, unloading and transportation. In addition, the Examiner does not believe that the notice properly informs the public of the fact that sacked lime is within the scope of these commodities which the applicant desires to transport. This type commodity is one that is regularly handled by general commodity common carriers. The Examiner does not believe that the notice given in this proceeding would serve to put these carriers on notice that this type of commodity is involved.

The paper rolls involved in this proceeding clearly require specialized equipment. They generally weigh above 4000 pounds each. It is apparent that this commodity cannot be loaded or unloaded without the use of a special type of fork lift. It must be transported in special cradles with chocks on the trailer unit. The Commission has also heretofore found in a contested

proceeding that this commodity requires special equipment for its loading, unloading and transportation.

The other commodities involved in this record such as screws, molding plaster, tape, joint treatment and runners clearly do not require special equipment under any stretch of the imagination. However, these commodities could be moved by a specialized motor carrier if their transportation is purely incidental to the basic transportation of a commodity requiring specialized equipment.

Therefore, the Examiner believes that gypsum wallboard, gypsum sheathing and gypsum paper rolls do require specialized equipment for their loading, unloading and transportation and may be the proper subject of a specialized motor carrier certificate insofar as a need is shown for their transportation. The items mentioned immediately above which do not require specialized equipment can be transported by a specialized motor carrier if their transportation is wholly incidental to the movement of the commodity requiring specialized equipment. The steel studs involved in this proceeding as well as the sack lime could not be the proper subject of a grant of authority for reasons heretofore given.

Accordingly, the Examiner finds that public convenience and necessity require the operation proposed by the applicant in the transportation of gypsum board paper rolls of not less than 4000 pounds each, and gypsum sheathing and gypsum wallboard, including specialty gypsum wallboard, and directly related materials used in the installation and application thereof, from the plant site of United States Gypsum Company at Galena Park, Texas, to all points in Texas, and re-

turned or rejected shipments on return, subject to the following restrictions: (1) The holder of this authority may transport gypsum sheathing and gypsum wallboard together with incidental related commodities moving within the same shipment, between points in the pickup and delivery limits of regular common carrier motor carrier in cities, towns and villages only when the shipment of gypsum wallboard or gypsum sheathing to which the related materials are incidental weighs in excess of 20,000 pounds. (2) The holder of this authority is restricted against the use of closed van trailers and is limited to the use of specially constructed heavy duty flat bed type units. No authority is recommended to transport any commodities other than return or refused shipments inbound to the Galena Park plant as absolutely no need has been shown for any transportation into the plant, nor has any deficiency in the existing transportation services inbound to this plant been shown. All authority sought not expressly recommended by the Examiner to be granted is expressly recommended to be denied.

/s/Wallace H. Nations
WALLACE H. NATIONS
Legal Examiner

RAILROAD COMMISSION OF TEXAS
TRANSPORTATION DIVISION
MOTOR TRANSPORTATION SECTION

DOCKET NO. 7144

APPLICATION OF COASTAL TRANSPORT CO., INC. TO AMEND SMC CERTIFICATE NO. 7144 SO AS TO AUTHORIZE IN ADDITION TO THE AUTHORITY THEREIN PRESENTLY CONTAINED, AUTHORITY TO TRANSPORT OVER IRREGULAR ROUTES, THE FOLLOWING: GYPSUM BOARD PAPER IN ROLLS OF NOT LESS THAN 4000 POUNDS EACH AND GYPSUM AND GYPSUM PRODUCTS, AND OTHER DIRECTLY RELATED MATERIALS AND SUPPLIES USED IN THE MANUFACTURE, INSTALLATION, APPLICATION AND/OR DISTRIBUTION THEREOF, BETWEEN THE PLANT SITE OF UNITED STATES GYPSUM CO. AT GALENA PARK, TEXAS, ON THE ONE HAND, AND, ON THE OTHER, ALL POINTS IN TEXAS, SUBJECT TO THE FOLLOWING RESTRICTIONS: (1) THE HOLDER OF THIS AUTHORITY MAY TRANSPORT THE ABOVE COMMODITIES, TOGETHER WITH INCIDENTAL AND RELATED COMMODITIES MOVING WITHIN THE SAME SHIPMENT, BETWEEN POINTS IN THE PICK-UP AND DELIVERY LIMITS OF THE REGULAR ROUTE COMMON CARRIER MOTOR CARRIERS IN CITIES, TOWNS AND VILLAGES ONLY WHEN ONE OR MORE OF THE SAID COMMODITIES, BECAUSE OF SIZE OR WEIGHT, OR BECAUSE OF PHYSICAL CHARACTERISTICS OTHER THAN WEIGHT REQUIRE

THE USE OF "SPECIAL DEVICES, FACILITIES OR EQUIPMENT" FOR THE SAFE AND PROPER LOADING, UNLOADING AND TRANSPORTATION THEREOF: (2) THE HOLDER OF THIS AUTHORITY IS RESTRICTED AGAINST THE USE OF CLOSED VAN TRAILERS AND IS LIMITED TO THE USE OF SPECIALLY CONSTRUCTED HEAVY DUTY FLAT-BED UNITS.

AUSTIN, TEXAS

ORDER

At a conference of the Railroad Commission of Texas held at its office in Austin, Texas the following findings were made:

That after statutory notice, said application was heard by the Examiner who has made and filed a report herein containing his findings of fact and conclusions of law thereon, which report is hereby adopted and made a part hereof; and said proceeding was duly submitted.

ACCORDINGLY, it is

ORDERED BY THE RAILROAD COMMISSION OF TEXAS that the application of Coastal Transport Co., Inc. to amend SMC Certificate No. 7144, BE, and same is hereby GRANTED IN PART, as follows:

TO TRANSPORT:
GYPSUM BOARD PAPER ROLLS of not less than 4000 pounds each, and GYPSUM SHEATHING AND GYPSUM WALLBOARD, INCLUDING SPECIALTY GYPSUM WALLBOARD,

and directly related materials used in the installation and application thereof, from the plant site of United States Gypsum Company at Galena Park, Texas, to all points in Texas, and returned or rejected shipments on return, subject to the following restrictions: (1) The holder of this authority may transport gypsum sheathing and gypsum wallboard together with incidental related commodities moving within the same shipment, between points in the pickup and delivery limits of regular common carrier motor carrier in cities, towns and villages only when the shipment of gypsum wallboard or gypsum sheathing to which the related materials are incidental weighs in excess of 20,000 pounds. (2) The holder of this authority is restricted against the use of closed van trailers and is limited to the use of specially constructed heavy duty flat bed type units.

It is further ORDERED that any authority sought that is not expressly granted is therefore DENIED.

RAIROAD COMMISSION OF TEXAS
TRANSPORTATION DIVISION
MOTOR TRANSPORTATION SECTION

DOCKET NO. 7144

Nov. 4, 1971

APPLICATION OF COASTAL TRANSPORT CO., INC. TO AMEND SMC CERTIFICATE NO. 7144 SO AS TO AUTHORIZE IN ADDITION TO THE AUTHORITY THEREIN PRESENTLY CONTAINED, AUTHORITY TO TRANSPORT OVER IRREGULAR ROUTES, THE FOLLOWING: GYPSUM BOARD PAPER IN ROLLS OF NOT LESS THAN 4000 POUNDS EACH AND GYPSUM AND GYPSUM PRODUCTS, AND OTHER DIRECTLY RELATED MATERIALS AND SUPPLIES USED IN THE MANUFACTURE, INSTALLATION, APPLICATION AND/OR DISTRIBUTION THEREOF, BETWEEN THE PLANT SITE OF UNITED STATES GYPSUM CO. AT GALENA PARK, TEXAS, ON THE ONE HAND, AND, ON THE OTHER, ALL POINTS IN TEXAS, SUBJECT TO THE FOLLOWING RESTRICTIONS: (1) THE HOLDER OF THIS AUTHORITY MAY TRANSPORT THE ABOVE COMMODITIES, TOGETHER WITH INCIDENTAL AND RELATED COMMODITIES MOVING WITHIN THE SAME SHIPMENT, BETWEEN POINTS IN THE PICK-UP AND DELIVERY LIMITS OF THE REGULAR ROUTE COMMON CARRIER MOTOR CARRIERS IN CITIES, TOWNS AND VILLAGES ONLY WHEN ONE OR MORE OF THE SAID COMMODITIES, BECAUSE OF SIZE

OR WEIGHT, OR BECAUSE OF PHYSICAL CHARACTERISTICS OTHER THAN WEIGHT REQUIRE THE USE OF "SPECIAL DEVICES, FACILITIES OR EQUIPMENT" FOR THE SAFE AND PROPER LOADING, UNLOADING AND TRANSPORTATION THEREOF: (2) THE HOLDER OF THIS AUTHORITY IS RESTRICTED AGAINST THE USE OF CLOSED VAN TRAILERS AND IS LIMITED TO THE USE OF SPECIALLY CONSTRUCTED HEAVY DUTY FLAT-BED UNITS.

AUSTIN, TEXAS

ORDER

At a conference of the Railroad Commission of Texas held at its offices in Austin, Texas the following findings were made:

That after statutory notice, said application was heard by the Examiner who has made and filed a report herein containing his findings of fact and conclusions of law thereon, which report is hereby adopted and made a part hereof, and that Exceptions and Replies thereto have been filed by the parties, have been duly considered by the Commission, and are overruled, and that said proceeding was duly submitted.

ACCORDINGLY, it is

ORDERED BY THE RAILROAD COMMISSION OF TEXAS that the application of Coastal Transport Co., Inc. to amend SMC Certificate No. 7144, BE, and the same is hereby GRANTED IN PART, as follows:

TO TRANSPORT:

GYPSUM BOARD PAPER ROLLS of not less than 4000 pounds each and GYPSUM SHEATHING AND GYPSUM WALLBOARD, INCLUDING SPECIALTY GYPSUM WALLBOARD, and directly related material used in the installation and application thereof, from the plant site of United States Gypsum Company at Galena Park, Texas to all points in Texas, and returned or rejected shipments on return, subject to the following restrictions: (1) The holder of this authority may transport gypsum sheathing and gypsum wallboard together with incidental related commodities moving within the same shipment, between points in the pickup and delivery limits of regular common carrier motor carriers in cities, towns and villages only when the shipment of gypsum wallboard or gypsum sheathing to which the related materials are incidental weighs in excess of 20,000 pounds. (2) The holder of this authority is restricted against the use of closed van trailers and is limited to the use of specially constructed heavy duty flat bed type units.

It is further ORDERED that any authority sought that is not expressly granted is therefore DENIED.

ATTEST:

/s/George F. Singletary, Jr.
GEORGE F. SINGLETARY, JR.
Secretary, Acting

RAILROAD COMMISSION OF TEXAS

/s/Byron Tunnell
BYRON TUNNELL
Chairman

/s/Ben Ramsey
BEN RAMSEY
Commissioner

/s/Jim C. Langdon
JIM C. LANGDON
Commissioner

E. JUDGEMENT OF THE SUPREME COURT OF TEXAS

SUPREME COURT OF TEXAS

February 20, 1974

No. B-4192.

LAKE TRANSPORT, INC.

vs.

RAILROAD COMMISSION OF TEXAS et al.

FROM TRAVIS COUNTY, THIRD DISTRICT.

"This cause came on to be heard on writ of error to the Court of Civil Appeals for the Third Supreme Judicial District and the original transcript and transcript showing the proceedings in the Court of Civil Appeals having been duly considered because it is the opinion of the Court (Associate Justices Walker, Pope and Johnson dissenting) that there was no error in the judgments of the Court of Civil Appeals and District Court, it is, therefore, *adjudged, ordered* and *decreed* that the judgments of the Court of Civil Appeals and District Court be, and hereby are, affirmed.

"It is further ordered that petitioner, Lake Transport, Inc., and its surety, Maryland American General Insurance Company, pay all costs expended and incurred in this Court and Court of Civil Appeals, and that this decision be certified to the District Court of Travis County, Texas, for observance."

F. ORDER OVERRULING MOTION FOR REHEARING

SUPREME COURT OF TEXAS

March 20, 1974

No. B-4192.

LAKE TRANSPORT, INC.

vs.

RAILROAD COMMISSION OF TEXAS et al.

FROM TRAVIS COUNTY, THIRD DISTRICT.

Petitioner's motion for rehearing filed in the above numbered and entitled cause on March 6, 1974, having been duly considered, it is ordered that said motion be, and hereby is, overruled.

G. STATUTES INVOLVED

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Art. 911b. Motor carriers and regulation by Railroad Commission

Certificates of convenience and necessity; issuance to specialized motor carrier; application; filing fee

Sec. 5a. (a) The Commission is hereby given authority to issue upon application and hearing as provided in this Act, to those persons who desire to engage in the business of a "specialized motor carrier," certificates of convenience and necessity in the manner and under the terms and conditions as provided in this Act. . . .

(d) Before any such application shall be granted, the Commisssion shall hear, consider and determine said application in accordance with Sections 8, 9, 11, 12, 13, 13a, 14, and 15 of Chapter 277, Acts of the Forty-first Legislature, Regular Session, as amended (Article 911b, Revised Civil Statutes of the State of Texas, 1925, as amended), and if the Commission shall find any such applicant entitled thereto, it shall issue certificate hereunder on such terms and conditions as is justified by the facts; otherwise said application shall be denied. The Commission shall have no authority to grant any application for a certificate of convenience and necessity authorizing operation as a "Specialized Motor Carrier" or any other common carrier unless it is established by substantial evidence (1) that the services and facilities of the existing carriers serving the territory or any part thereof are inadequate; (2) that there exists a public necessity for such service, and (3) the public convenience will be promoted by granting said application. The order of the Commission granting said application and the certificate issued

thereunder shall be void unless the Commission shall set forth in its order full and complete findings of fact pointing out in detail the inadequacies of the services and facilities of the existing carriers, and the public need for the proposed service. Likewise, the Commission shall have no authority to grant any contract carrier application for the transportation of any commodities in any territory or between any points where the existing carriers are rendering, or are capable of rendering, a reasonably adequate service in the transportation of such commodities.

Review of decisions of Commission by district court of Travis County; appeals

Sec. 20. If any motor carrier or other party at interest be dissatisfied with any decision, rate, charge, rule, order, act, or regulation adopted by the Commission, such dissatisfied person, association, corporation, or party after failing to get relief from the Commission may file a petition setting forth the particular objection to such decision, rate, charge, rule, order, act or regulations, or to either or all of them in the District Court in Travis County, Texas, against said Commission as defendant. Said action shall have precedence over all other causes on the docket of a different nature and shall be tried and determined as other civil causes in said court. Either party to said action may appeal to the Appellate Court having jurisdiction of said cause and said appeal shall be at once returnable to said Appellate Court having jurisdiction of said cause and said action so appealed shall have precedence in said Appellate Court over all causes of a different

character therein pending; provided, that if the court be in session at the time such right of action accrues the suit may be filed during such term and stand ready for trial after ten days' notice. In all trials under this section the burden of proof shall rest upon plaintiff, who must show by the preponderance of evidence that the decisions, rates, regulations, rules, orders, classifications, acts, or charges complained of are unreasonable and unjust to it or them. The Commission shall not be required to give any appeal bond in any cause arising hereunder and no injunction shall be granted against any order of the Commission without hearing unless is shall clearly appear that irreparable injury will be done the complaining party if the injunction is not granted.

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Supreme Court, U. S.
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JUL 12 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

October Term, 1973

No. 73-1883

LAKE TRANSPORT, INC.,
Petitioner,

V.

RAILROAD COMMISSION OF TEXAS, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

JOINT BRIEF FOR RESPONDENTS IN OPPOSITION

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In The

Supreme Court of The United States

October Term, 1973

No. 73-1883

LAKE TRANSPORT, INC.,

Petitioner,

V.

RAILROAD COMMISSION OF TEXAS, ET AL.,

Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

JOINT BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

The case involves a question of Texas law which does not involve and cannot be made to involve any issue arising under the Federal Constitution.

The question is whether petitioner, Lake Transport, Inc., the holder of an inactive contract carrier permit issued to it by the Railroad Commission of Texas, and who at all material times was not transporting property for compensation or hire, had stand-

ing to appeal an order of the Railroad Commission of Texas granting Coastal Transport Company, Inc., a certificate of public convenience and necessity as a specialized motor carrier. The Trial Court, the Court of Civil Appeals, and the Supreme Court of Texas have resolved the question against the petitioner.

INVOLVED STATUTES

Sec. 1(h), Sec. 6(a) and Sec. 6-bb of Article 911b, Tex.Rev.Civ. Stat. Ann. and Rule 10 (formerly Rule 30) of the Rules of Practice and Procedure for the Transportation Division, The Railroad Commission of Texas, which are attached hereto as Appendix "A," are pertinent hereto, in addition to the statutes attached as Appendix "B" to the Petition for Certiorari.

STATEMENT OF THE CASE

Because of inaccuracies in petitioner's statement, we here state the nature of the case. The facts as here stated are substantially as stated by the Texas Court of Civil Appeals (Appendix B to Petition, pages 18-22) and the Supreme Court of Texas (Appendix C to Petition).

By an application filed on June 22, 1970, Respondent Coastal Transport Co., Inc., sought additional authority as a Specialized Motor Carrier transporting, among other things, Gypsum Board Paper in Rolls, of not less than 4,000 pounds each, and Gypsum and Gypsum Products, between the plantsite of United States Gypsum Company at Galena Park, Texas, on

the one hand, and, on the other, all points in Texas, subject to certain restrictions (Tr. 14, S.F. 24). Petitioner filed a written notice of protest to such application, which notice was dated July 1, 1970, and received by respondent Railroad Commission on July 6, 1970. Protests were also filed by Brown Express, Inc., Central Freight Lines, Inc. and Red Arrow Freight Lines, Inc. These protests were withdrawn prior to hearing (Tr. 14). With the filing of protests under Rules 19 and 20 of the Commission's Rules of Practice (S.F. 27), the application became a "protested" proceeding. Hearing was held at Austin, Texas on December 8, 1970, and was concluded after the sixth day of hearing (S.F. 24). Petitioner's Contract Carrier Permit No. 12058 issued in January, 1964, is all of the authority issued to petitioner by the Railroad Commission of Texas which served as a basis for its protest of Respondent Coastal's application (S.F. 25). Petitioner's Contract Carrier Permit No. 12058 authorized it to operate as a *contract carrier* transporting among other things Gypsum Paper, Wallboard and Sheathing from the facilities of the United States Gypsum Company at Galena Park, Texas to all points in Texas within a four hundred (400) mile radius of Galena Park, Texas and vice versa, for United States Gypsum Company (S.F. 24, 25). The only contract under the terms of which Lake Transport, Inc. provided transportation service for United States Gypsum Company from October, 1968, to November 12, 1970, contained a provision as follows:

> "9. This contract is subject to termination at any time by either party upon 30 days' written notice to the other and shall continue in effect until so terminated."

(S.F. 25, 26). The only contract under the terms of which petitioner provided transportation service for United States Gypsum Company from October 19, 1968, to November 12, 1970, was cancelled by United States Gypsum Company in writing effective November 12, 1970, and no transportation service of any kind has been provided for United States Gypsum Company by petitioner under authority of Contract Carrier Permit No. 12058 since said date (S.F. 25, 26).

Prior to the commencement of the hearing on the application of respondent Coastal, it filed a motion to strike the protest of petitioner on the ground that petitioner was a contract carrier, and its contract with United States Gypsum Company, the supporting shipper in respondent Coastal's application, had been terminated and because of the termination of the contract, petitioner was not a proper party protestant within the meaning of the Commission's Rules of Procedure (Tr. 15). That motion was overruled by the Hearing Examiner *as a preliminary matter,* and petitioner was permitted to participate in the proceeding (Tr. 15).

The Examiner found that it was not necessary to decide whether or not petitioner was technically a proper party protestant (Tr. 46), and he further found as follows:

"As the applicant points out in its brief, a contract carrier has no statutory obligation apart from its contract, to provide service to a contracting shipper. Likewise, the Commission has no statutory authority to require a contract carrier to serve its supporting shipper or shippers. It follows that as a general proposition the Commission should not require a contracting shipper to utilize a particular contract carrier. The contract carrier permit issued to Lake only authorizes service under a continuing contract with USG. The Commission cannot dictate the terms of the contract between Lake and USG or for that matter force the parties to enter into a contract. There now exists no contract beween the parties, and at least with respect to USG no intention to again enter into a contract with Lake. It is therefore the Examiner's opinion that in the absence of such contract, Lake is not properly authorized to serve USG and hence, is not an 'existing carrier' within the meaning of Art. 911b." (Tr. 48).

The Examiner found that the application of respondent Coastal should be granted, in part, and so recommended (Tr. 51, 52).

Exceptions to the Examiner's Report and Recommended Order were filed by petitioner (Tr. 54). Reply thereto was filed by respondent Coastal (Tr. 94), oral argument was requested by petitioner and after oral argument before the full Commission, by order served November 4, 1971, the Commission adopted the Examiner's Report and granted the authority to respondent Coastal to the extent recommended by the Examiner (S.F. 94).

From the foregoing, it is clear that contrary to the

assertions of petitioner, the petitioner was *never* held by the Railroad Commission of Texas to be a proper party protestant—a party in interest—even though the Examiner *preliminarily* overruled respondent Coastal's motion to strike petitioner's protest, and it is further clear that, as found by the Court of Civil Appeals (Appendix B to Petition, pages 24-25), the Examiner could have properly sustained respondent Coastal's motion to strike petitioner's protest under the provisions of Rule 10 (Appendix A) at the beginning of the proceeding before the Railroad Commission.

Petitioner then sought to invoke the appeal provisions of Sec. 20, Article 911b, Tex.Rev.Civ.Stat.Ann. (Appendix G to Petition, page 115).

The Trial Court sustained respondent' Coastal's plea in abatement to petitioner's suit, on the ground that petitioner had no justiciable interest and was without standing to seek judicial review of the order of the Railroad Commission granting respondent Coastal's Specialized Motor Carrier Certificate. (Appendix A to Petition, page 14, and Appendix C to Petition, page 31). That action was affirmed by the Court of Civil Appeals, the intermediate Court, and by the Supreme Court of Texas, (Appendices B and C to Petition), both Courts having held that petitioner *was not* a motor carrier at interest with any statutory or constitutional right to appear and protest respondent Coastal's application, or to appeal under Section 20 of Article 911b.

THE WRIT SHOULD BE DENIED FOR THE FOLLOWING REASONS

1. The Legislature of Texas has provided for review of action of the respondent Railroad Commission in Sec. 20, Art. 911b. As the Supreme Court of Texas pointed out in its opinion in this case, the following statement of the rule from 2 Am.Jur.2d, Administrative Law, Sec. 559 was quoted with approval in *Groendyke Transport, Inc. v. Railroad Commission*, 426 SW 2d, 645 (Tex.Civ.App. 1968, writ ref'd, n.r.e.):

> "Where judicial review of administrative action is provided in the statute under which the administrative action is taken, the right of appeal to the courts is to be determined by looking at the statute, the valid regulations promulgated pursuant to it, and proven administrative practice throwing light upon their meaning."

The Supreme Court also in its opinion in this case pointed out that:

> "It was also recognized in *Groendyke* that Rule 10 of the Commission (formerly Rule 30) has been in effect in substantially the same form since 1946 and has consistently been enforced to disallow appearances by protesting specialized motor carriers who held no permanent certificated authority to perform any of the services proposed to be performed by an applicant."

This is *not* a case where no review of the administrative action is available.

It cannot be disputed, however, that to invoke the review procedure, one must satisfy the statutory requirements of the review statute. For example, in

Federal Power Commission v. Colorado Interstate Gas Company, 348 US 492, 99 L Ed 583, 75 S Ct 467, it was held that the provisions of the Natural Gas Act prescribing explicitly the procedure to be followed by any person seeking review of an order of the Federal Power Commission, which procedure limits the scope of review, must be followed.

The crux of the matter is that petitioner is not within the class which may invoke the appeal provisions of the statute—as the undisputed facts demonstrate that it is not a party in interest under Sec. 20 of Article 911b and Rule 10. The respondent Railroad Commission and all of the Courts below have correctly so held.

As the Supreme Court of Texas found, the shipper cancelled its contract with petitioner November 12, 1970 (almost a year prior to the issuance of the order which petitioner seeks to attack), pursuant to the contractural provisions for termination, and the right of such cancellation is not questioned. The undisputed facts are that petitioner had the same contractual right of cancellation and it could not be required by the respondent Railroad Commission to continue to serve the contracting shipper, or any other. Petitioner's contention that it was "harmed" by the grant of respondent Coastal's certificate and its declaration that it was "put out of business" by the grant of such authority, are both contrary to the undisputed facts and to the determinations made by the Supreme Court of Texas that petitioner's existing

service was not impaired because petitioner was not performing any service—it *was not an existing carrier.* As the Supreme Court of Texas correctly found:

> "Necessarily, the right of appeal provided by the statute presupposes that an appealing carrier is authorized to perform, and is performing, the character of service authorized by the Commission; thus the appealing carrier is in a position to show not only that the new service will impair its existing service by the loss of sustaining revenues, but also by reason of the availability of the existing services, there is not a public need for the newly authorized service.
>
> It is manifest that the holder of an inactive contract carrier permit such as Lake cannot make this showing. It is of no significance in this respect that it is the policy of the Commission not to subject such a permit to cancellation. The salient fact is that Lake is not performing an existing service and may never do so again. Lake is not a common carrier and, as stated, is under no duty or responsibility as such. It cannot show any impairment of its service. To say that Lake has a statutory right of appeal under such circumstances would be to say that it has the right to defeat a service which it is not rendering and even to the limited extent of its permit, a service which it may possibly never render again; and this notwithstanding the common carrier service in question has been found by the Commission to be required by the public convenience and necessity. In our view, such an anomaly was not intended by the Legislature and is precluded by the requirement in Section 20 of Article 911b that an appealing party must be a party at interest and one in the position to show that the order under attack is unreasonable and unjust as to its existing service . . . ." (Appendix C to Petition, pages 34-35).

Petitioner has not been denied due process under any concept and has not raised any federal question nor are any authorites cited by petitioner applicable to the facts of this case.

2. There is no conflict between the opinion and judgment of the Supreme Court of Texas and the holdings of this Court on standing.

The cases relied upon by petitioner are distinguishable from this case. In *Association of Data Processing Service Organizations v. Camp,* 397 US 150, 25 L Ed 2d 184, 90 S Ct 827, the plaintiff was a "competitor" within that class of "aggrieved" persons who were held to be entitled to review of "agency action" as opposed to petitioner's situation here, where it is *not* an existing carrier, *not* a "competitor" under the undisputed facts, and, as the Supreme Court of Texas has correctly found, cannot show that the respondent Railroad Commission's action was unreasonable or unjust as to its existing service, and cannot show any impairment of its service.

In *Flast v. Cohen,* 392 US 83, 20 L Ed 2d 947, 88 S Ct 1942, a taxpayer's suit, it is clearly shown that before a person has standing to sue, it must first show that it is a proper party or party at interest. There it was held that the taxpayer had a personal stake in the outcome of the controversy, which, as pointed out above, is not the case here. Petitioner is not an existing carrier and cannot show any impairment of its service.

Air Reduction Company v. Hickel, 420F.2d 592 (D.C.Cir. 1969) simply holds that the complaining parties had standing to challenge an agency's regulations because they had existing beneficial business relations which would be terminated and interfered with by such regulations. That, again, is not the case as to petitioner here.

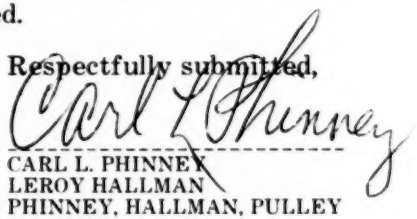
The authorities cited do not support petitioner's position.

CONCLUSION

Not being an existing carrier, petitioner's existing service has not been impaired, nor has petitioner been harmed or injured. Therefore, petitioner is not within that class described in the applicable statute and rules of the respondent Railroad Commission as parties in interest, and, consequently it has no standing to appeal this proceeding. It has not been denied any constitutional or statutory guarantee.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Carl L. Phinney, one of the attorneys for Respondents herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 11th day of July, 1974, I served three copies of the foregoing document, in duly-addressed envelopes, with postage prepaid, as required by Rule 33(1) of this Court, upon each of the following parties:

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APPENDIX A
STATUTES INVOLVED

PERTINENT SECTIONS OF ARTICLE 911b TEXAS REVISED CIVIL STATUTES ANNOTATED

Section 1(h):

> (h) The term "contract carrier" means any motor carrier as hereinabove defined transporting property for compensation or hire over any highway in this State other than as a common carrier.

Section 6(a):

> Sec. 6. (a) No motor carrier now operating as a contract carrier or that may hereafter desire to engage in the business of a contract carrier shall so operate until it shall have received a permit from the Commission to engage in such business and such permit shall not be issued until the applicant shall have in all hings complied with the requirements of this Act; nor shall such permit be issued unless the character of business being done or to be done by the applicant strictly conforms with the definition of a contract carrier. The Commission shall have the power to suspend for ten (10) days any existing permit after notice and hearing and to revoke any existing permit when it appears that such permit holder has disobeyed or violated any provision of this Act or of General Laws regulating motor vehicles or violated any rule or regulation of the Commission authorized by this Act.

Section 6 bb:

> Sec. 6-bb. No application for permit to operate as a contract carrier shall be granted by the commission to any person operating as a common

carrier and holding a certificate of convenience and necessity, nor shall any application for certificate of convenience and necessity be granted by the Commission to any person operating as a contract carrier nor shall any vehicle be operated by any motor carrier with both a permit and a certificate.

Rule 10 of the Rules of Practice and Procedure for the Transportation Division, The Railraod Commission of Texas:

Rule 10: Parties in Interest.

Any party in interest may appear in any proceeding before the Transportation Division. All appearances shall be subject to a motion to strike upon a showing that the party has no justiciable or administratively cognizable interest in the proceeding. As applied to proceedings under Article 911a and 911b of the Revised Civil Statutes of 1925 involving operating authority, a party in interest is any carrier operating over a route within that territory or serving any point proposed to be served by any applicant, and transporting any of the same class or classes of commodities or persons proposed to be transported by the applicant.